

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE EASTERN DISTRICT OF TEXAS
4 TYLER DIVISION

5 SOVERAIN SOFTWARE)
6 -vs-) DOCKET NO. 6:07cv511
7)
8) Tyler, Texas
9) 8:42 a.m.
10 NEWEGG, INC.) April 29, 2010

11 TRANSCRIPT OF TRIAL
12 MORNING SESSION
13 BEFORE THE HONORABLE LEONARD DAVIS,
14 UNITED STATES DISTRICT JUDGE, AND A JURY

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1 P R O C E E D I N G S

2 (Jury in.)

3 THE COURT: Please be seated.

4 All right. Mr. Sayles, you ready to
5 proceed?

6 MR. SAYLES: We are ready to proceed,
7 Your Honor.

8 THE COURT: All right.

9 MR. SAYLES: And in keeping with the
10 Court's procedures, we have our list of exhibits to
11 offer and to provide to the Court Reporter for the
12 record.

13 THE COURT: Very well.

14 MR. SAYLES: On April 28th, Newegg
15 offered and these exhibits were admitted into evidence:
16 Defense Exhibit 1 and Defense Exhibit 50.

17 Today Newegg offers into evidence, with
18 no objection by Sovereign, Defense Exhibits 2 through 6,
19 156, 488, 495, 501, 504, and 505.

20 THE COURT: Be admitted.

21 MR. SAYLES: May I approach,
22 Ms. Ferguson --

23 THE COURT: Yes, you may.

24 MR. SAYLES: -- to give her the list?

25 THE COURT: Plaintiff have something

1 similar?

2 MR. ADAMO: Mr. Sayles, do you have
3 another one?

4 MR. SAYLES: Yes. I gave you that.

5 MR. ADAMO: No, no. I just thought maybe
6 you had two there.

7 MR. SAYLES: Oh, that's cumulative, so...

8 MR. ADAMO: Thank you.

9 I'm sorry, Your Honor. Yes, I do.

10 THE COURT: All right.

11 MR. ADAMO: Good morning.

12 THE COURT: Good morning.

13 MR. ADAMO: This will be Plaintiff's
14 Exhibit List 3, Your Honor, and these are exhibits
15 that -- excuse me -- Newegg has agreed are admissible,
16 and there are no objections, Plaintiff's 16, Plaintiff's
17 17, and Plaintiff's 27A.

18 And Ms. Ferguson has previously marked
19 these as Plaintiff's Exhibit List 3.

20 THE COURT: Okay. Very well.

21 MR. ADAMO: These are extra copies for
22 the Court's...

23 Thank you, Your Honor.

24 THE COURT: You may proceed.

25 MR. BALDAUF: At this time, Defendant

1 Newegg calls Mr. Edward Tittel, who has already been
2 sworn.

3 THE COURT: Okay.

4 MR. BALDAUF: Your Honor, is it okay
5 during this testimony if I walk back and forth between
6 the podium and the board?

7 THE COURT: Excuse me?

8 MR. BALDAUF: May I walk back and forth
9 between the podium and the board throughout this?

10 THE COURT: Yes, you may.

11 MR. BALDAUF: Okay. May I proceed?

12 EDWARD R. TITTEL, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

13 DIRECT EXAMINATION

14 BY MR. BALDAUF:

15 Q Good morning, Mr. Tittel. How are you today?

16 A I'm fine. Thank you.

17 Q Could you please introduce yourself to the
18 members of the jury.

19 A Yes. My name is Edward R. Tittel, and I live
20 in Round Rock, Texas.

21 Q And how are you employed at the present time,
22 sir?

23 A I'm a full-time freelance writer and
24 consultant.

25 Q And on what topic do you write?

1 A I write on a number of different
2 computer-related topics, but my primary areas of
3 interest are Windows, computer security, and markup
4 languages.

5 Q And how many books have you written on
6 computer-related subjects?

7 A Well, to tell you the truth, I've lost count.
8 The last time I managed a complete count, it was around
9 140.

10 Q And I'm just going to show a quick slide of
11 just some of the many titles that you've written.

12 A I've always been afraid that when I show up at
13 the pearly gates, St. Peter is going to kick me out for
14 killing so many trees.

15 Q I'd like to talk about a couple of these books
16 that you've written in a little bit greater detail.

17 First, I'd like to turn to what is Defendant's
18 Exhibit 54, Building Web Commerce Sites, which I have
19 right here, by Ed Tittel, Charlie Scott, and others.

20 Are you the Ed Tittel referenced on the cover
21 of this book?

22 A Yes, I am.

23 Q What is the subject of Building Web Commerce
24 Sites?

25 A This book explains to smaller companies how

1 they could build a website that would include E-commerce
2 capabilities, such as a shopping cart and payment
3 handling, and manage financial records to keep track of
4 payments.

5 Q I'd next like to bring to your attention
6 Defendant's Exhibit 65, which is Foundations of
7 Worldwide Web Programming With HTML and CGI.

8 This book is written by Ed Tittel, Mark
9 Gaither, and others. Are you the Ed Tittel referenced
10 on the cover of this book?

11 A Yes, I am.

12 Q What is the subject matter of this book, sir?

13 A When web servers were first built, they really
14 didn't have much ability beyond displaying pages of text
15 to users for them to look at information.

16 CGI stands for common gateway interface, and
17 it was a technology that was developed in the '92/'93
18 timeframe that allowed the web server to talk to other
19 programs so that it could communicate with the database,
20 perform calculations, access libraries of images; in
21 other words, extend the capability of a web server to
22 more than just put text and images up on the screen.

23 Q I'd next like to turn your attention to
24 Defendant's Exhibit 63, which is the CGI Bible.

25 This book says it's written by Ed Tittel and a

1 few others. Are you the Ed Tittel referenced on this
2 book?

3 A Yes, I am.

4 Q Now, first of all, what is CGI?

5 A CGI, again, is the common gateway interface.
6 It is the programming interface that allows a web server
7 to call some other program so that it can do something
8 for it.

9 Basically, web servers can grab files and push
10 them to users in a lot of cases. Especially when you
11 want to have a user interact with a web page, a back-end
12 program accessed through CGI was the original way to add
13 that kind of capability to a website.

14 Q By the way, when was this one written?

15 A The CGI Bible has a publication date of 1997.

16 Q Okay. I just asked because the copy that we
17 have has a price tag on it where it says: Clearance \$3.
18 So I guess this one is not doing so well.

19 A Nothing is as cheap as old technology.

20 Q Next, I'd like to bring your attention to
21 Defendant's Exhibit 662, which is my favorite, HTML for
22 Dummies by Ed Tittel and Stephen James.

23 Are you the Ed Tittel?

24 A Yes, I am.

25 Q What is html?

1 A Html stands for hypertext markup language, and
2 it refers to a collection of elements that you can put
3 into a text file to control what happens when that text
4 file shows up at a web server.

5 You can change the color of the font. You can
6 change the type of font. You can change the position of
7 elements on the page. You can bring in graphics. You
8 can bring in other elements and objects. And html
9 basically handles all of that capability.

10 Q How many editions of HTML for Dummies have you
11 written?

12 A As of 2008, that book has gone into its 12th
13 edition.

14 Q Have you contributed any other volumes to the
15 four Dummies series?

16 A Yes. I have written Dummies books on Novell
17 Netware, on Windows server, on xhtml, and we even had a
18 book out for a while called More HTML for Dummies.

19 Q I bet that was great.

20 A Right.

21 Q Have you written any articles on
22 computer-related topics?

23 A I started writing articles for publication in
24 1986 for a Macintosh magazine called The Macazine.

25 And then next -- that next year when I went to

1 work for a California-based technology company, they
2 very foolishly offered a thousand-dollar bonus for each
3 article that an employee could place in a computer trade
4 journal.

5 And after I earned 18 of those bonuses that
6 year, they changed the program.

7 Q And how many articles have you written on
8 computer-related subjects?

9 A I'm guessing that magazine articles probably
10 number somewhere around 800 to a thousand and that
11 articles for the web, probably double that amount.

12 Q Could you please walk us very quickly through
13 your educational background?

14 A Sure. I'm an Army brat, so I went to school
15 all over the place. And my dad wound up at Fort Belvoir
16 in Northern Virginia just before he retired, so I
17 graduated from high school in Fairfax County, Virginia.

18 I went to Princeton in 1970, and I graduated
19 with a degree in anthropology in 1973.

20 I went to work for the Library of Congress for
21 three years after that. And then in 1976, I came down
22 to the University of Texas at Austin, and I got a
23 master's degree in anthropology in 1979. And that same
24 year, I switched over to computer science.

25 In 1981, I got a letter from the Dean of the

1 Computer Science Department saying that I had earned
2 enough credit in computer science to get a bachelor's
3 equivalency, which basically means everything except the
4 diploma. And when I stopped taking graduate classes in
5 1982, I was about two-thirds of the way to a master's
6 degree in computer science.

7 Q So what happened? Did you finally have to
8 start working for a living?

9 A That's one way of looking at it. There was a
10 company called Information Research Associates that was
11 founded by three of the members of the CS faculty at UT.
12 And they recruited graduate students to work on projects
13 for them, and it basically turned out they kept me so
14 busy, I didn't have time to go to school anymore.

15 Q Okay. I do not want to run step by step
16 through your work history in the interest of time, but
17 did you work in the computer field prior to your writing
18 career took off?

19 A Well, the first seven years after I got out of
20 grad school, I worked in a variety of different software
21 development jobs, all of them related in some form or
22 fashion to databases.

23 In 1987, I took a job with a California-based
24 company called Excelan that was acquired by Novell in
25 1989, and that's when I got more into the networking

1 side of things.

2 I stayed with Novell until 1994, and I -- my
3 last job at Novell was director of technical marketing,
4 and I was responsible for all corporate communications
5 with publications and for developer conferences and also
6 for technical content for trade shows, which means I got
7 to spend a lot of time in strange places.

8 And the reason why I left Novell was because
9 they announced they were going to close down their
10 Austin facility, and I had two stepkids in high school;
11 and the boss and I decided that it was probably better
12 to leave them where they were than to move to California
13 or Utah.

14 Q Do you still live in the Austin area to this
15 day?

16 A I'm -- well, I'm now in Round Rock. I'm sort
17 of a tax refugee from Austin, but I still live in the
18 Austin area, yes.

19 Q Could you please explain to the jury -- and I
20 want to try to do better of this. We've been throwing
21 around these technical jargons, and I know some of them
22 I don't understand, and I'm sure there are a lot of
23 other people that don't.

24 Could you please explain what TCP/IP is to the
25 jury very simply?

1 A Sure.

2 TCP/IP is an acronym, and it actually is
3 spelled T-C-P, slash, I-P, and that's because TCP is the
4 name of one internet protocol, and IP is the name of
5 another internet protocol.

6 When you put them together, you have two of
7 the most important protocols that are used on the
8 internet, but you also have a shorthand way of referring
9 to all of the protocols that are used on the internet.

10 So, normally, when you say TCP/IP, most people
11 think internet protocols.

12 Q Now, did you work with TCP/IP during your
13 employment?

14 A Yes. I started working with TCP/IP when I was
15 at Schlumberger in 1984 through '86.

16 Then when I took my next job, the way I found
17 my next employment was, we had several different kinds
18 of computers, PCs, Macintoshes, and DEC VAX machines
19 that we had to figure out how to get them to talk to
20 each other.

21 Q Okay. Now, Mr. Tittel, I -- it is
22 interesting, but --

23 A Okay. I'll stop.

24 Q -- we want to speed this up today.

25 A Sorry.

1 Q Okay. Were you a software developer at any of
2 your jobs?

3 A Yes. I was a software developer until I went
4 to work at Excelan in 1987.

5 Q But does your experience include working with
6 E-commerce sites?

7 A I have never developed and built any commerce
8 site, but I have certainly integrated E-commerce
9 packages into websites.

10 Q Is it fair to say that you have certainly
11 studied and written about them?

12 A Yes, that's fair.

13 Q How long have you been working exclusively in
14 the computer field?

15 A I started working in 1981, and it turned out
16 to be full-time that year. So that would make 29 years.

17 Q Have you ever been retained as an expert prior
18 to this case?

19 A No, I have not.

20 Q Do you have any legal training?

21 A No.

22 Q Are you a lawyer?

23 A No.

24 Q Are you here to explain the law to the Court?

25 A No, I'm not.

1 Q What do you understand to be the purpose of
2 your testimony?

3 A The purpose of my testimony is to examine the
4 patents and to try to understand and explain them in
5 terms of the other things that I know about, related
6 tools and technologies.

7 Q Now, you said you've never been retained as a
8 witness before this case. Prior to this case, had you
9 ever had your deposition taken?

10 A No, I had never been deposed before.

11 Q And prior to right now, have you ever
12 testified before in court?

13 A First time ever.

14 Q Okay. I'm going to break up your testimony
15 into two distinct parts.

16 The first part, we're going to talk about
17 non-infringement, and then we're going to switch gears
18 and talk about invalidity, okay?

19 A Okay.

20 Q Now, I know you're prepared to discuss all of
21 these various claim limitations in exhaustive detail,
22 but in the interest of time, I would like you to skip
23 over a lot of the repetitive claim elements and simple
24 design choices and issues, and let's just focus on the
25 big pictures. Okay?

1 A Okay.

2 Q Have you reviewed the claims of the three
3 patents asserted by Soverain against Newegg?

4 A Yes, I have.

5 Q Did you read the file histories?

6 A Yes, I did.

7 Q When?

8 A When I was deposed in -- I believe it was
9 August of last year, the file history was brought to my
10 attention at that time. Subsequently, it was furnished
11 to me, and I read it at that time.

12 Q Have you studied Newegg's systems?

13 A Yes. To the extent that they're documented in
14 Mr. Wu's giant notebooks with source code and examples.

15 Q And unlike Dr. Grimes, did you review Newegg's
16 actual computer code relating to the functionality at
17 issue here?

18 A Yes, I did.

19 Q Have you reviewed Soverain's infringement
20 contentions?

21 A Yes, I have.

22 Q And have you reviewed Newegg's invalidity
23 contentions?

24 A Yes, I have.

25 Q Who prepared Newegg's invalidity contentions?

1 A The attorneys prepared those invalidity
2 contentions.

3 Q Did you independently evaluate these
4 contentions?

5 A Yes. I took each of those contentions and
6 examined the references and made sure that the
7 contentions matched my understanding of what the
8 references told me about the claims.

9 Q And did you incorporate and adopt these
10 contentions into your analysis?

11 A Yes, I did.

12 Q Now, I think there may have been a little bit
13 of confusion on one point during your deposition
14 stemming from the fact that you're not a lawyer or a
15 professional witness. But have you considered and
16 studied the Court's claim constructions?

17 A Yes, I have.

18 Q Can you explain to us why your first report
19 did not list the claim constructions as something that
20 you had considered?

21 A Yes, I can, and with some apologies.

22 The file system that I used at first when I
23 was preparing my first expert report consisted of
24 keeping all the documents that the attorneys furnished
25 to me to use for my analysis in a pile. And to that

1 pile, I added other documents that I found myself.

2 And then when I wrote the report, I made a
3 list of everything that was in that pile.

4 Unfortunately, one of the items that should
5 have been in that pile was not in that pile, and it was
6 the claim constructions. And that's why that doesn't
7 appear until the inventory for my second expert report.

8 Q Now, were the constructions that you used
9 substantively different from the Court's constructions?

10 A Expect for one term, database, my
11 interpretation of the terms and the Court's
12 interpretations of the terms were completely synonymous.

13 So except for areas that are really no longer
14 in contention for this case, my understanding of the
15 terms at the time I wrote that report and my
16 understanding of the terms as I sit before you right now
17 are completely in accordance with the claim
18 construction.

19 In fact, in my notebook, which nobody else has
20 in their notebook, the first pages are the very same
21 claim constructions so that I can refer to them, should
22 we need to do so this morning.

23 Q Using the Court's claim constructions, does
24 Newegg infringe any of the asserted claims of the
25 Soverain patents?

1 Specifically using those claim
2 constructions --

3 A Yes. The contested claims, correct?

4 Q -- does -- yes. Does Newegg infringe any of
5 those claims?

6 A No, they do not.

7 MR. GIANNETTI: I object, Your Honor. He
8 said he's not going to express any opinions. That
9 sounded like an opinion to me. I move to strike.

10 THE COURT: Restate your question,
11 Counsel.

12 MR. BALDAUF: We can move on, Your Honor.

13 THE COURT: All right. So the objection
14 is sustained, and the jury is instructed to disregard
15 the last question and answer.

16 Q (By Mr. Baldauf) I'd first like to talk about
17 the issue of non-infringement. Let's focus first on the
18 '314 claim.

19 Now, Soverain has alleged the infringement of
20 Claims 35 and 51. Since these claims are dependent upon
21 Claim 34 and can't be infringed unless Claim 34 is
22 infringed, I want to just focus on Claim 34 only.

23 What is your understanding about how many
24 limitations Newegg must not satisfy to avoid
25 infringement?

1 A My understanding is that if Newegg fails to
2 satisfy a single limitation of the claim, it fails to
3 infringe.

4 Q Now, I don't want to belabor this point, but
5 listening to the testimony here this week and just based
6 upon common sense, do you agree that Newegg does not
7 supply at least the one buyer computer and the user?

8 A Absolutely.

9 Q I couldn't decide whether to use red or black.
10 Red will work.

11 I'd like to move down to -- well, strike.

12 Just one last thing. Does Newegg somehow
13 control or direct the user to come to Newegg's website?

14 A No, they don't.

15 Q I'd like to now move on to 34(f).

16 Said buyer computer being programmed to
17 receive a plurality of requests from a user to add a
18 plurality of respective products to a shopping cart in
19 said shopping cart database.

20 First, who sends the request: Newegg or the
21 customer?

22 A The customer does.

23 Q And, again, this claim is very -- this claim
24 language is very important.

25 I want to talk about right here, shopping cart

1 in said shopping cart database. What is the
2 significance of that language?

3 A The significance of that language is that the
4 shopping cart information is stored in a shopping cart
5 database.

6 Q Meaning that the shopping cart has to be in
7 the shopping cart database at this time?

8 A That's the way I read the language, yes.

9 Q Likewise, what is the significance of the word
10 respective?

11 A Well, if we think of a sentence that uses the
12 word respective or respectively, it might say something
13 like I gave my wife and my sister a ring and a pendant
14 respectively. That means you gave your wife a ring and
15 your sister a pendant.

16 So when I see that word respective showing up
17 in the language, what it says to me is that as each item
18 is added to the shopping cart, a corresponding change or
19 addition is made to the shopping cart database.

20 Q So does Newegg -- I'm sorry.

21 In the Newegg system, does the user add a
22 plurality -- either a plurality of requests from the
23 user to add a plurality of respective products to a
24 shopping cart in said shopping cart database?

25 A Yes. If the user decides to buy more than one

1 item, that satisfies the needs for the plurality. And
2 what happens is, as each item gets added, the
3 add-to-cart button gets hit on the catalog page, and
4 through a back and forth with the server, the
5 client-side cookie gets updated to incorporate the
6 contents that's just been added.

7 Q So when that's being added, are those requests
8 to add the plurality of respective products, are they
9 going to a shopping cart while it's in the shopping cart
10 database?

11 A No. They're going to a cookie that's on the
12 customer computer.

13 Q Now, we've been talking all week about the
14 difference between the server-side shopping cart that is
15 disclosed and claimed in the patent and the client-side
16 or back-and-forth methodology that Dr. Stewart testified
17 to yesterday.

18 Is this language significant with respect to
19 that difference?

20 A Yes, it is.

21 Q I would like to talk about this limitation in
22 the context of a demonstrative that we've put together.

23 A Okay.

24 Q If you could first explain to the jury what
25 we're seeing here.

1 A What you see on this display on the right-hand
2 side of the screen is a picture of the customer
3 computer. And you'll notice that off to the right, in
4 the box at the bottom, we've cleverly put a chocolate
5 chip cookie behind a table of items.

6 And what we're about to do is to add some
7 stuff to a shopping cart and show you how it winds up
8 inside that cookie.

9 Q Okay. So let's -- let's do this. So the
10 customer hits add-to-cart --

11 A Right.

12 Q -- which I'm going to do. What else?

13 A So when the customer hits the add-to-cart
14 button, a message goes through the worldwide web to the
15 server.

16 And the server uses something called the set
17 cookie command in its return page to the client, and
18 then the item and the quantity for the shopping cart
19 contents gets updated.

20 So we see one camera shows up in the cookie.

21 Q Is the Newegg shopping cart in the shopping
22 cart database when it receives this request to add this
23 product?

24 A No. You'll notice that our little red ball
25 bounces back strictly between the client and the web

1 server, and we don't go to the shopping cart database,
2 at least not yet.

3 Q Which is the one that's above on --

4 A That's the one on top at the left, yes, that's
5 correct.

6 Q Okay. So let's go ahead. The customer
7 decides he wants to buy something else. Here goes.

8 Add-to-cart again.

9 A Okay. So we hit add-to-cart, goes through the
10 web, hits the server, server creates a set cookie
11 request, and bingo, when it gets back to the client, we
12 add one battery to our cookie.

13 Q Okay. So now a plurality of products have
14 been added to the shopping cart, correct?

15 A Yes, that's correct.

16 Q But have they been added to the shopping cart
17 while it's in the shopping cart database?

18 A No. As you can see from our demonstrative, no
19 action has touched the shopping cart database just yet.

20 Q Okay. One more time.

21 A Okay.

22 Q You've got a camera. You've got a battery.

23 A That's right. We need a memory card now.

24 Q Okay.

25 A So let's go ahead and push the button.

1 Q Here we go.

2 A Send a message to the web server. It sends a
3 set cookie request that adds a memory card to our
4 collection of items for our digital camera, and now our
5 cookie is stuffed with three pieces of merchandise.

6 Q Okay. So now we've placed three separate
7 items in the shopping cart, correct?

8 A Yes, that's correct.

9 Q At any time has that shopping cart been in the
10 shopping cart database?

11 A No, it has not yet hit the shopping cart
12 database.

13 Q Okay. So now, when does it go to the shopping
14 cart database?

15 A When we hit the checkout button and stop
16 shopping, that's the point at which a message leaves the
17 client, goes to the web server, and then finally goes up
18 into the shopping cart database.

19 Q Now, to be clear, is a request to check out a
20 request to add products to the shopping cart?

21 A No, sir.

22 Q Okay. So let's show what happens.

23 A Okay. When we click add -- I'm sorry -- when
24 we click checkout --

25 Q Checkout.

1 A -- the red ball goes through the web, hits the
2 server. The server sees it's a checkout request, so it
3 grabs the contents of the cookie, and it pushes them
4 into the shopping cart database.

5 Q One time.

6 A Exactly. One time.

7 Q Now, this is the Newegg cookie-side
8 methodology, correct?

9 A Yes, it is.

10 Q I would now like, using another demonstrative,
11 to contrast this with the server-side system that is
12 claimed in the '314 patent.

13 A Okay.

14 MR. GIANNETTI: I object, Your Honor.
15 Characterizing the claims, and I don't think he should
16 be doing that.

17 THE COURT: Restate your question.

18 MR. BALDAUF: We can just move on to the
19 exhibit.

20 THE COURT: All right.

21 Q (By Mr. Baldauf) Mr. Tittel, what do we have
22 before us?

23 A What we have here is a server-side database
24 system, which means that when a shopper adds an item to
25 a cart, a message goes from the web browser through the

1 web server to the database server so that each time
2 something goes in the cart, something also happens in
3 the shopping cart database.

4 Q So let's do the same thing here. Let's put a
5 -- let's try to buy a first product, okay?

6 A Okay. So we click add-to-cart, and the
7 message goes to the web server and straight up into the
8 shopping cart database where a shopping cart record is
9 created, and we put a camera inside it.

10 Q Okay. So let's do a second request.

11 A Okay. So then control returns to the client,
12 and the client selects a second product, goes back to
13 the web server and again to the shopping cart database
14 where the battery, quantity 1, gets put into the
15 shopping cart record in the shopping cart database for
16 that user session.

17 Q And a third product?

18 A Same thing all over again. Hits the server,
19 then up to the database, and bingo, there's our memory
20 card that shows up for the camera in the shopping cart
21 record in the shopping cart database.

22 Q Using an example -- excuse me -- using the
23 example of a regular physical shopping cart that someone
24 would use at Wal-Mart or the grocery store, can you
25 explain the difference between Newegg's database method

1 and the server-side model?

2 A Yes. The Newegg method uses a shopping cart
3 in a conventional sense in that you go to the grocery
4 store, your cart is in your hand, head to the produce
5 section, drop in a head of lettuce, head to the canned
6 goods, grab a can of beans, drop it in the cart, head to
7 the dairy section, grab a quart of milk, drop it in,
8 roll it up on the register, pay, and go out.

9 On the other hand, the server side is more
10 like there is no shopping cart, and you go grab the
11 lettuce, and you walk it to the conveyor belt at the
12 cash register, and then you walk from there back into
13 the canned goods section, grab the can of beans, bring
14 it to the conveyor belt, and then finally to the dairy
15 section, grab your milk, bring it to the conveyor belt.

16 Then you can check out with the clerk and pay
17 for your merchandise.

18 Q Why does Newegg use this cookie methodology as
19 opposed to the server-side database system?

20 A There are two very important reasons why
21 Newegg chose this implementation. And we heard Mr. Wu
22 talk about this to some extent yesterday.

23 One of those reasons is that updating a cookie
24 involves only two machines, right?

25 When we saw the demonstrative, the information

1 goes from the client to the web server, and then the web
2 server uses a set cookie command to send the shopping
3 cart contents back to the client.

4 Only two machines involved. A lot faster.
5 The data that's involved is simple text data that's very
6 quick to move and very quick to write.

7 On the other hand, the server-side model
8 actually involves three machines, and it also turns out
9 that doing things to databases requires a lot more
10 instructions and a lot more processing power and time
11 than writing entries into a text file. That's the way
12 that computers work.

13 The other reason is that in testimony we've
14 heard here in the trial, only 6 to 8 percent of shopping
15 carts that get started on the Newegg website actually
16 end up going to checkout.

17 In earlier conversations with Mr. Wu, he had
18 told me it was 1 out of every 20. So that either
19 translates into 1 out of 6, to 1 out of 12, or even as
20 many as 1 out of 20. All of those other shopping carts
21 never go to the cash register.

22 So if you use a database model, you're looking
23 at a tremendous volume of machine time, network traffic,
24 and storage space to accommodate all of that
25 information.

1 And when -- you know, we saw from those
2 numbers that right now Newegg is handling a million
3 completed transactions a month. Well, if those ratios
4 that I just explained are true, that means we're looking
5 at somewhere between 6, 12, or maybe even 20 million
6 shopping carts that never turn into anything.

7 Why would you want to put that kind of
8 information in the database somewhere? It just doesn't
9 make sense.

10 Q Are there likewise disadvantages to using the
11 Newegg cookie system as opposed to the server-side
12 model?

13 A Well, first and foremost, if you want to shop
14 on the Newegg site, you have to turn the cookies on. It
15 won't work otherwise.

16 And as we heard Mr. Stewart --

17 Q Please go ahead. I'm sorry.

18 A As we heard Mr. Stewart say in his deposition
19 yesterday, for security reasons, people do turn shopping
20 carts off -- I'm sorry -- cookies off. I beg your
21 pardon.

22 The other reason is that if I shop at home, my
23 shopping cart stays with my web browser. In fact, if I
24 open Internet Explorer and Firefox on my machine, if I
25 start shopping on Firefox, I can't access that same

1 information in Internet Explorer because the cookie
2 stays with the browser.

3 Q In the server-side model, could you shop from
4 multiple computers?

5 A As long as you were able to reestablish the
6 same session that you started and grab the contents of
7 its associated shopping cart, yes, you could.

8 Q With respect to this issue of cookies, if the
9 user disables cookies, is there anything that Newegg can
10 do about it to enable them?

11 A No. No. Newegg can't reach into the
12 customer's -- customer's machine and change that
13 setting.

14 Q Will the server-side database system work if
15 cookies are disabled?

16 A The server-side database works just fine if
17 cookies are disabled.

18 Q Is the Newegg cookie method equivalent to the
19 server-side method, meaning does it work in the same way
20 and get the same result?

21 MR. GIANNETTI: I object, Your Honor.
22 This is outside the scope of his report.

23 THE COURT: Restate your question.

24 MR. BALDAUF: I think we made the point.
25 I'm not sure I heard the objection, but we can move on.

1 THE COURT: All right. The jury will
2 disregard the last question.

3 Q (By Mr. Baldauf) So based upon all that, does
4 Newegg satisfy the limitation of said buyer computer
5 being programmed to receive a plurality of requests from
6 the user to add a plurality of respective products to a
7 shopping cart in said shopping cart database?

8 A No, it does not.

9 MR. ADAMO: How many people does it
10 take --

11 MR. BALDAUF: That makes a bad joke,
12 doesn't it?

13 MR. ADAMO: How many people does it take
14 to screw in a lightbulb?

15 Mr. Baldauf, how many lawyers does it
16 take?

17 MR. BALDAUF: Yeah.

18 MR. SAYLES: I can do it without help.

19 MR. ADAMO: Yeah. I can see you trying
20 it without help, Mr. Sayles.

21 Q (By Mr. Baldauf) I don't want to spend a lot
22 of time on this right now, because this limitation
23 appears over and over again in these claims, and we can
24 discuss it in connection with one of the other claims.

25 But does Newegg program the buyer computer?

1 A No, they don't.

2 Q I'd like to talk about 34(h). Specifically,
3 this language: Said shopping cart computer being
4 programmed to receive said plurality of shopping cart
5 messages to modify shopping cart in said shopping cart
6 database?

7 Why is that language significant to this
8 claim?

9 A Because it says that when the contents of the
10 shopping cart change, the contents of the database
11 change.

12 Q Using these two side-by-side slides, can you
13 explain to us what you mean by modifying said shopping
14 cart in said shopping cart database?

15 A Well, if we look at the top of the slide,
16 which represents the Newegg system, what we see is that
17 as items get added to the cart, it's the cookie on the
18 customer computer that changes and that no interaction
19 with the shopping cart database is involved.

20 On the other hand, if we look at the
21 server-side implementation at the bottom of the slide,
22 each time an item is added to the shopping cart, a
23 corresponding change is made to the contents of the
24 shopping cart record in that shopping cart database.

25 Q So does Newegg satisfy the limitation of said

1 shopping cart computer being programmed to receive said
2 plurality of shopping cart messages to modify shopping
3 cart in said shopping cart database?

4 A No, it does not.

5 MR. BALDAUF: I'm afraid to touch this
6 thing now.

7 MR. SATINE: Mr. Sayles will fix it.

8 Q (By Mr. Baldauf) Were you here for Mr. Grimes'
9 testimony?

10 A Yes.

11 Q Did you hear when he testified that the
12 assignment of a shopping cart ID creates an instance of
13 a shopping cart in the Newegg shopping cart database
14 that is then modified?

15 A Yes, I did.

16 Q Have you also heard the assertions from
17 Soverain that going from no record to a record in a
18 database constitutes modification of the shopping cart
19 in the shopping cart database?

20 A Yes, I have.

21 Q Do you agree with either of these assertions?

22 A No, I don't, and I'll tell you why.

23 Q Please look at the demonstrative and explain
24 why.

25 A Okay. Let's take a look at the demonstrative

1 that's up on the screen. When we get to that point in
2 the checkout process -- if you'll remember, when we go
3 from the web server up to the database server at the
4 very end, what happens in the code is that an integer
5 counter or just a number gets read from a variable, and
6 that number is the shopping cart ID.

7 Q Okay. Stop there.

8 A I'm sorry?

9 Q Stop right there.

10 Is there any empty field, anything associated
11 with that number that can be changed, modified, or
12 otherwise?

13 A No. It's just a counter, and it has nothing
14 to do with the database either.

15 On the other side of the diagram, going to the
16 right, we see the contents of the cookie moving into a
17 variable so that all the data can be combined.

18 So what happens is, we get a number on the
19 left, which is our shopping cart ID, and we get data on
20 the right, which is our shopping contents, and all of
21 that information, in a single SQL command, gets dropped
22 into the database in one fail swoop.

23 In database terminology, modify means to
24 change an existing record. And, in fact, if you look at
25 the claim construction, the definition of modify, as

1 applied to the shopping cart in the shopping cart
2 database, reads: To change an instance of a shopping
3 cart in a shopping cart database.

4 Creation in database terms is not change.
5 It's what's called instantiation, because you go from
6 something -- I'm sorry -- from nothing to something.

7 So it's not a modification. Modification
8 means changing something that's already there.

9 Q Does Newegg satisfy each and every element of
10 the asserted claims of this patent?

11 A No, it does not.

12 Q Okay. I'd now like to turn to the '492,
13 specifically Claim 17, briefly.

14 MR. BALDAUF: Be careful with that, Dan.
15 No. I'm sorry, Dan. Claim 17 first. Yes.

16 Oh, well, that's all right, because we
17 weren't going to say much about it anyway.

18 Q (By Mr. Baldauf) As Dr. Grimes testified, do
19 you agree that Claim 17 is virtually identical to
20 Claim 34 that we just discussed?

21 A With a few minor differences, yes.

22 Q I'd like to just talk about this very, very
23 quickly.

24 With respect to a couple of the limitations
25 that we just discussed in Claim 34, at least one buyer

1 computer for operation by a user desiring to buy
2 products, the buyer computer being programmed to receive
3 a plurality of requests from a user to add a plurality
4 of products to a shopping cart in said shopping cart
5 database, and then the shopping cart computer being
6 programmed to receive a plurality of shopping cart
7 messages to modify the shopping cart in the shopping
8 cart database, for the reasons that you just explained,
9 with respect to Claim 4 -- 34, does Newegg satisfy those
10 limitations for Claim 17 of the '492 patent?

11 A No, they don't.

12 Q Now let's talk about this one.

13 A Okay.

14 Q Sovereign also asserts Claims 41 and 61 of the
15 '492 patent. Again, these depend upon Claim 15, so I
16 would just like to talk about Claim 15.

17 Again, we have the same limitation. Once
18 again, a client computer for operation by a client user.

19 And does Newegg supply the client computer and
20 client user?

21 A No, it doesn't.

22 Q Does Newegg somehow direct or control the
23 client to come to its website and shop?

24 A No. Shopping remains a free-will experience.

25 Q I would now like to talk about programming. I

1 told you before I didn't want to talk about programming.

2 This is what I want to talk about.

3 A Okay.

4 Q 15(f): The client computer being programmed
5 to display the statement document to receive a request
6 from the client user to display transaction details and
7 so forth.

8 Does Newegg program the client computer to
9 display the state in the document?

10 A No, it doesn't.

11 Q How is the client computer programmed?

12 A The client computer receives an html document
13 that it includes information about what the display is
14 on the screen and how to display it.

15 As you notice -- whoops, I knocked out
16 the screen. Sorry.

17 Q Let's start -- let's back up just one second
18 before --

19 A Okay.

20 Q I want to talk about programming in two
21 sentences -- I'm sorry -- in two sentences.

22 First, I want to talk about the browser on the
23 client computer. Who programs or puts the browser on
24 the client computer?

25 A Browsers come from software development

1 companies, like Microsoft with Internet Explorer, the
2 Mozella Foundation for Firefox, Opera Software for
3 Opera, and so on and so forth.

4 Q Does Newegg do that? Do they program and put
5 those browsers on the customers' computers?

6 A No, they don't.

7 Q Now, sitting here throughout the week, have
8 you heard testimony that Soverain suggests that when
9 Newegg server sends html pages to the customer's browser
10 that this constitutes programming?

11 A Yes, I have.

12 Q Will the customer's browser display Newegg's
13 page without the instructions sent on these html pages?

14 A No, it can't.

15 Q But does that have any issue -- or any bearing
16 on the issue of programming?

17 A No, not really.

18 Q Is it fair to say that you know a little bit
19 about html?

20 A Yes, that's a fair statement.

21 Q And this is one of those instances where we
22 could say you wrote the book.

23 A That's right.

24 Q Let me give you the book.

25 A Okay. Thanks.

1 You'll notice that the cover -- cover of this
2 book says HTML. Html stands for hypertext markup
3 language.

4 A markup language is a language that's
5 designed to handle text and to do things with text and
6 to interact with other kinds of computing facilities.

7 A programming language is a general-purpose
8 software development tool that can be used to create any
9 kind of program.

10 In other words, what you can do with a markup
11 language is pretty limited. You can't use it to do
12 mathematical calculation. You can't use it to influence
13 logic or decisions. You can't use it to create
14 general-purpose programs.

15 What html does, it does very well, but by
16 consensus with the computer science field, a markup
17 language is not a programming language.

18 And that's the basis for my belief that this
19 is not programming. This is document handling and
20 document processing.

21 And html files are called html documents.
22 They're not called html programs. That's the common
23 practice in the industry, and it's been that way ever
24 since html came on the scene in 1991.

25 Q So does Newegg client -- does Newegg program

1 the client computer and display the statement document
2 to receive a request from the client user to display
3 transaction details corresponding to a portion of the
4 statement document displayed by the client computer and
5 to cause a transaction detail hypertext link
6 corresponding to the portion of the statement document
7 to be activated?

8 A No.

9 Q So does Newegg satisfy all the limitations of
10 the asserted claims of this patent?

11 A No, it does not.

12 Q I'd now like to turn to the '639 patent.

13 A Okay.

14 Q Do you understand that this is referred to as
15 the session ID patent?

16 A Yes, I do.

17 Q In general, how does the basic inherent
18 function of the internet relate to session IDs?

19 A If by the internet, you mean the worldwide
20 web --

21 Q Sorry. I did.

22 A -- session mechanisms are necessary to
23 establish ongoing communications between a pair of
24 communicators, usually, a client and a server.

25 Q Let's take a look at this. You see the ball

1 going back and forth.

2 A Yes.

3 Q Is this necessary for this type of system to
4 work?

5 A The only way that you can use the worldwide
6 web is for a client to communicate with a server. It's
7 inherent in the way that the worldwide web works.

8 Q Does it necessarily require the participation
9 of two separate parties?

10 A Yes, it does.

11 Q Let's first take a look -- this one is on your
12 screen -- the limitation of forwarding a service request
13 from the client to the server system.

14 What does this mean?

15 A Well, if you look at the picture on the
16 screen, you see the red rubber ball goes through a cloud
17 labeled worldwide web.

18 If you actually look at what happens to a
19 packet or a piece of information when it goes from a
20 client -- a web client to a web server, you'll see that
21 in between where it starts out at the client and where
22 it ends up at the server, there's a lot of places where
23 it stops in between.

24 Each one of those stops usually occurs at a
25 router or a firewall somewhere, and when it arrives

1 there, the device checks the address and looks at it and
2 says, hey, I can't do this here locally; I got to pass
3 it on to somebody else who can -- who might be able to
4 handle it himself.

5 And so there's a whole bunch of intermediate
6 steps called forwards involved between getting from the
7 client to the server.

8 Q Does Newegg forward the service request from
9 the client to the server system?

10 A No. Newegg does not forward that information.

11 And that's, again, inherent to the way that
12 the internet works.

13 Q The claim then requires the client storing the
14 session identifier for use in subsequent distinct
15 requests to the server system.

16 Now, this limitation is also in Claim 78.
17 What does it mean for the client to store the session
18 identifier?

19 A When you set up a session or you log on to a
20 server what usually happens is, you're going to give it
21 an account and a password or some other kind of
22 credentials to prove who you are, and then if the server
23 likes what it sees, it's going to say, okay, you can do
24 something with me.

25 And part of the message that it sends back

1 that tells you it's okay for you to do something with it
2 is a special identifier that's built so that it's hard
3 to fake out and hard to forge, and it becomes a part of
4 what the client uses afterwards to communicate back with
5 the server.

6 The reason why this happens is because it
7 takes some time to look up a password and to check an
8 account name and to figure out what that account is
9 allowed to do and so on and so forth.

10 And if you had to do it every time you sent a
11 message between a client and a server, it would put lots
12 of unnecessary overhead on that communication.

13 So the shortcut that gets used in a lot of
14 different systems is that once you establish your
15 credentials, which is called authentication, then you
16 get some kind of token or identifier back from the
17 server that you can use to communicate so that you don't
18 have to go through all that hoopla every time you go
19 back and forth.

20 Q Who performs this step of storing the session
21 identifier?

22 A The customer computer stores the session
23 identifier and then uses it in subsequent
24 communications.

25 Q Does Newegg control or direct the customer and

1 his or her computer to store the session identifier?

2 A No. That's a basic behavior of how the web
3 works.

4 Q Moving on. Appending the stored session
5 identifier to each of the subsequent distinct requests
6 from the client server system.

7 What does this mean?

8 A This is what I referred to earlier as the
9 shortcut that the client uses to say, hey, you know me;
10 I'm okay, and to be able to gain access not just to the
11 server but also to whatever kind of ongoing interaction
12 it has with the server.

13 Q Who performs this step?

14 A The client does.

15 Q And does Newegg control or direct the client
16 to do so?

17 A No. Again, it's inherent to the way that the
18 web works.

19 Q Does Newegg satisfy every limitation of the
20 asserted claims in the '639 patent?

21 A No, it does not.

22 Q Now, next we're going to move on to start
23 talking about invalidity, but I want to ask you one last
24 thing.

25 Now, we've been talking about cookies all

1 morning.

2 A Okay.

3 Q Mr. Grimes was asked why a cookie is called a
4 cookie and did not know. Could you please explain that
5 to the jury? I think it's kind of interesting.

6 A Yeah, it is sort of an interesting story.
7 The original name for cookies was magic cookie, and the
8 reason why it's magic is because it's a piece of
9 information that passes in the background between a
10 client and a server, and it's not usually visible to the
11 client, but it's a way of moving information back and
12 forth.

13 And the reason why it's called a magic cookie
14 is because it's based on a fortune cookie where you
15 don't know what's inside until you break it and read
16 the, you know, help, I'm a prisoner in a Chinese fortune
17 cookie factory. So that's why they call it a magic
18 cookie.

19 Turns out that magic cookies were used in a
20 number of systems in the late 1980s, including as
21 authentication for the X Windows system that Mr. Treese
22 told us about during his testimony.

23 Q I'd like to now switch gears and talk about
24 invalidity.

25 First, how were you employed during the

1 1994/1995 time period when these patents were filed?

2 A That's when I was working on my CGI books, and
3 an edition of HTML for Dummies and when we were starting
4 to plan out our E-commerce book.

5 Q Do you have a firm understanding of the
6 subject matter of these patents?

7 A Yes, I do.

8 Q Now, we've talked about some of your writings
9 earlier. Could you please explain how your writings are
10 relevant to the subject matter of these claims just in
11 general?

12 A Sure.

13 In addition to the various web development
14 topics that we've already discussed, I've written a
15 college textbook on computer networking and another
16 college textbook on TCP/IP.

17 So I have a pretty good understanding of the
18 protocols and mechanisms that are used to make things
19 work on the internet in general and on the web in
20 particular.

21 Q Now, based upon what we heard yesterday from
22 Mr. Trevor, we're going to be talking here quite a bit
23 about CompuServe --

24 A Yes.

25 Q -- as well -- as well as some other prior art.

1 You have a pretty good familiarity of
2 CompuServe yourself; is that correct?

3 A Yes. I got my first CompuServe account in
4 1987 when I started writing those magazine articles I
5 told you about.

6 Turns out that back then, CompuServe was
7 probably the major way that most magazines required
8 their writers to file stories to get assignments to
9 communicate about work and so on and so forth, and so I
10 started becoming a CompuServe user pretty much right
11 away.

12 Q I'd like to also show you Defendant's Exhibit
13 511, which is a book called The Trail Guide to
14 CompuServe by Robert Wiggins and Ed Tittel.

15 Are you the Ed Tittel that wrote this book?

16 A Yes, I am.

17 Q What kind of review of CompuServe did you do
18 to write this book?

19 A Well, publishers don't like to just give money
20 away to write books, so they usually have to jump
21 through some hurdles to get them to give you their
22 money.

23 For the vast majority of books that I've
24 written I have had to submit a formal book proposal.
25 And a book proposal has a survey of the market, it has

1 an outline that says what you're going to write about,
2 and then it has something called a competitive analysis.

3 And a competitive analysis means you go out
4 and look up all the other books on that subject, and you
5 look at them, and read as much of them as you can, and
6 you provide a summary of what those books cover. And
7 then you explain why your book is going to be better
8 than their book and it's going to say something that
9 their book doesn't say, and ya-da, ya-da, ya-da.

10 Q I would first like to discuss the '314 patent,
11 but in doing so, we're going to talk about a few
12 CompuServe books first.

13 Before we get started, do you know when the
14 application for the '314 patent was filed?

15 A In October of 1994.

16 Q First, I'd like to talk about a book that
17 Mr. Trevor talked about yesterday, Defendants' Exhibit
18 2, How to Get the Most Out of CompuServe.

19 Do you know when this book was published, sir?

20 A Yes, it was published in 1989.

21 Q Prior to the filing date of the '314 patent?

22 A Yes, that's correct.

23 Q Are you familiar with this book?

24 A Yes, I am. I used it -- when I went to work
25 at Novell, because they didn't have that many people

1 that knew TCP/IP, I became what was called a sysop on
2 CompuServe. That stands for system operator. Sounds
3 fancy, but it means you're a babysitter. You have to
4 keep all the unruly forum participants in line, and then
5 you have to answer all the questions that nobody else
6 wants to answer. So it kept me up nights.

7 But, anyway, at that time I obtained a copy of
8 the Bowen and Peyton book and used it as a reference
9 while I was trying to become as proficient with
10 CompuServe as possible.

11 Q I would next like to show you Defendants'
12 Exhibit 4, which was likewise discussed by Mr. Trevor
13 yesterday, Using CompuServe by Ellsworth and Ellsworth.

14 Do you know when this book was published?

15 A Yes, this book was published in March of 1994.

16 Q I think it was actually April.

17 A Maybe April. That's true, yeah. It was
18 somewhere in that neighborhood.

19 Q Is this prior to the filing date of the '314
20 patent?

21 A Yes, it is.

22 Q Are you familiar with this book?

23 A This book was, by and large, considered the
24 Bible for CompuServe at the time. The Ellsworths had
25 the reputation of having the best reference on

1 CompuServe around. So this was the one that we paid the
2 most attention to in our competitive analysis.

3 Q Next I would like to show you what is being
4 marked as Defendants' Exhibit 3, CompuServe CIM Running
5 Start by Bob Campbell.

6 Do you know whether this book was published,
7 sir?

8 A According to the copyright page, this book was
9 published in 1993.

10 Q Again, prior to the filing of the '314 patent?

11 A Yes.

12 Q Now you heard Mr. Trevor testify yesterday
13 that these books were not written for programmers. Do
14 you agree with that?

15 A Yes, I do agree with that. These books were
16 aimed at end users to show them how to use CompuServe,
17 to teach them what CompuServe could do, to explain and
18 illustrate lots of different services and capabilities
19 that CompuServe could provide, and in general to help
20 them become better CompuServe users.

21 Q However, would someone skilled in the art of
22 computer programming understand how to create the
23 described functionality in these books based upon
24 disclosure?

25 MR. GIANNETTI: I object, Your Honor. No

1 basis for this opinion.

2 THE COURT: Restate the question and lay
3 a predicate.

4 Q (By Mr. Baldauf) Mr. Tittel, based upon your
5 long experience in the industries, the hundreds of books
6 that you have written, do you believe that you have the
7 ability to explain to us whether one of ordinary skill
8 in the art would understand how to program something
9 based upon a disclosure in a book as to what the end
10 functionality is?

11 A I do.

12 Q Based upon that understanding, would someone
13 reading the disclosure in these books understand how to
14 implement that functionality?

15 MR. GIANNETTI: I object. There's no
16 foundation for this opinion, Your Honor.

17 THE COURT: Overruled.

18 A In general, if you know how to write software
19 and you read about or see how a software system works,
20 you can figure out what's going on underneath the hood.

21 If you see menus being used -- menus are
22 things that programmers know how to create and how to
23 manipulate. If you see data being manipulated, if you
24 understand the kind of manipulation that's involved, you
25 can write code to perform that manipulation.

1 This generally is a technique known as reverse
2 engineering, and software developers do it everyday to
3 figure out how to build programs or how to take
4 functionality that they like that they see in somebody
5 else's program and add it to their program.

6 I don't know if y'all are old enough to
7 remember back when --

8 MR. GIANNETTI: Your Honor, this is a
9 narrative.

10 THE COURT: Sustained.

11 Q (By Mr. Baldauf) Okay. We can move on.

12 A Excuse me.

13 Q (By Mr. Baldauf) I would like to show you Page
14 321 of the Using of CompuServe book. I'm sorry, 221 of
15 How to Get the Most Out of CompuServe.

16 Could you please --

17 A Which exhibit is that one?

18 Q How to Get the Most Out of CompuServe is
19 Defendants' Exhibit 2, but it's on the screen right in
20 front of you.

21 A Okay.

22 Q Could you please read the bottom portion of
23 this page that's displayed, and then explain to us what
24 it means.

25 A Yes. Let's start with: Here is the rundown

1 on ordering, which refers to how to order something on
2 CompuServe.

3 You browse through a single store's database,
4 ordering as many things as you like with the O command.
5 That means when you find something you like, you select
6 it, and then you hit the O key to tell the server that
7 you want to put it in your personal holding file.

8 As you exit the store, you are taken to an
9 order area, which is the electronic version of a
10 checkout clerk with a cash register, where you are asked
11 for information such as name, address, phone number, and
12 your method of payment, which often is a credit card
13 number but can vary depending on the merchant with which
14 you are dealing.

15 There are stopping places all along the way to
16 make corrections to the ordering information and even to
17 cancel the entire order. In other words, the O command
18 isn't a final commitment, so a slip of the fingers won't
19 get you into trouble.

20 Q Could a customer purchase multiple items from
21 a merchant in the CompuServe Mall based upon this
22 disclosure?

23 A Yes, they could.

24 Q In the interest of time -- we were going to
25 talk about the same language that appears in the

1 Campbell book, but I would like the move this along a
2 little bit.

3 Turning to the Ellsworth and Ellsworth book,
4 Using CompuServe, there are a number of pages here that
5 Mr. Trevor talked about yesterday, but --

6 MR. BALDAUF: Mr. Brean, if we can just
7 go to Page 376.

8 Q (By Mr. Baldauf) I am going to move through
9 these quickly so we could speed this up a little bit.

10 A Okay.

11 Q Could you please read these portions from 376
12 of the Ellsworth and Ellsworth book to us?

13 A Certainly.

14 The order command functions the same way for
15 each store, but merchants may vary in payment and
16 delivery options. Some merchants also offer extended
17 warranty options. Again, pay attention to these
18 options. When you find a product that you want to buy,
19 press O for order. Your order will be stored in a
20 personal holding file until you leave that merchant's
21 store.

22 Next paragraph: Press R to continue browsing
23 the store in which you just placed the order. You can
24 place as many orders in the store as you want. When you
25 are finished shopping in that store, type checkout. An

1 electronic order form appears.

2 Q I'd like to focus your attention specifically
3 on the underlying language: Your order will be stored
4 in a personal holding file until you leave the
5 merchant's store.

6 Using the Court's construction, is the
7 personal holding file a shopping cart in a shopping cart
8 database?

9 A Yes, it is a shopping cart in a shopping cart
10 database.

11 The personal holding file itself is a shopping
12 cart. And because CompuServe supported multiple
13 individuals shopping in the same store at the same time,
14 a collection of such files would be maintained, and that
15 would meet the Court's requirements for a shopping cart
16 database.

17 Q I would now like to discuss how the teachings
18 of the CompuServe Mall in these references match up with
19 the claims.

20 First of all, a network-based sales system.
21 The Using CompuServe book describes the use of WINCIM to
22 connect the computers. What does this explain to us
23 about CompuServe being a network-based sales system?

24 A Well, the existence of sophisticated
25 communication software designed to work with the

1 CompuServe information service indicates there was a
2 communications client that the PC or a buyer computer
3 could use to communicate with the CompuServe servers
4 back in Columbus, Ohio.

5 And we know from Mr. Trevor's testimony
6 yesterday, that there was actually a pretty complicated
7 network in between the local points of presence, where
8 your modem line might go, and the 40-plus Digital
9 Equipment minicomputers back in Columbus, Ohio.

10 Q But does this text of Using CompuServe
11 disclose the limitation of a network-based sales system?

12 A Yes.

13 Q Next: At least one buyer computer for
14 operation by a user desiring to buy products.

15 Again, looking at the same language, what does
16 this tell us about the existence of the buyer computer?

17 A Well, we see the name of a specific client.
18 It's a piece of software called WINCIM, although, again,
19 as we heard from Mr. Trevor yesterday, CompuServe had
20 lots of different clients for various platforms that you
21 could use to log into CompuServe and go shopping in the
22 CompuServe Mall.

23 Q And the Bowen and Peyton, I think this one
24 maybe is a little bit even more clear: Turn on your
25 computer and run your communications program.

1 Again, do these references teach the existence
2 of a buyer computer for operation by a user desiring to
3 buy products?

4 A Absolutely.

5 Q At least one shopping cart computer.

6 What does this language in using CompuServe
7 tell us about the existence of a shopping cart computer?

8 A Well, the architecture of CompuServe was such
9 that no information was stored on the client except
10 perhaps as related to how screens looked and what kind
11 of buttons there were and that sort of thing.

12 Any information about products, product
13 selection, purchase, whatever, would be sent in a
14 message from the client to the server. And, in fact,
15 the personal holding file is on the server, and that's
16 where we find our shopping cart computer.

17 Q And specifically then, moving down to How to
18 Get the Most Out of CompuServe, it talks about the
19 existence of 40 Digital Equipment Corporation
20 microcomputers.

21 Did you ever visit that site?

22 A Yes, I did.

23 Q What do these references on -- do these
24 references teach the existence of a shopping cart
25 computer?

1 A Yes, they do.

2 Q In a shopping cart database connected to said
3 shopping cart computer.

4 Going back to the Using CompuServe book, what
5 does this explain to us about a shopping cart database
6 connected to said shopping cart computer?

7 A Well, because we know there was a personal
8 holding file for each individual user who was active in
9 a merchant's store, and that multiple users could be
10 active in any individual store at anytime, there would
11 be multiple personal holding files where those personal
12 holding files represent -- each represents a shopping
13 cart, and the collection of personal holding files
14 represents a shopping cart database.

15 Q Is this confirmed in How to Get the Most Out
16 of CompuServe book?

17 A Yes, it is.

18 Q Do these books disclose a shopping cart
19 database connected to said shopping cart computer?

20 A Yes, they do.

21 Q Said buyer computer and said shopping cart
22 computer being interconnected by a computer network.

23 I doubt this is very, very controversial, but does the
24 Using CompuServe book disclose the interconnection by a
25 computer network?

1 A Absolutely. Not only did CompuServe operate
2 its own networks, but it also interoperated with other
3 networks as well.

4 Q These networks there such as TimeNet, Telenet,
5 DATAPAC, et cetera?

6 A Sprintnet, yes, numbers of others.

7 Q Do these books disclose the limitation of said
8 buyer computer and said shopping cart computer being
9 interconnected by a computer network?

10 A Yes, they do.

11 Q Okay. I was dreading these, they are so long.
12 Said buyer computer being programmed to receive a
13 plurality of requests from a user to add a plurality of
14 respective products to a shopping cart in said shopping
15 cart database, and, in response to said requests to add
16 said products, to send a plurality of respective
17 shopping cart messages to said shopping cart computer,
18 each of which comprises a product identifier identifying
19 one of said plurality of products.

20 Could you please first explain to us what that
21 means in simpler terms?

22 A Yes. That means that you can pick a product
23 and put it in your shopping cart, and, in fact, that you
24 can pick more than one product and put it in the same
25 shopping cart.

1 Q Is this disclosed in the Using CompuServe
2 book?

3 A The CompuServe Mall supported numerous stores.
4 And inside each store, users could order one or more
5 products, in fact, as many as they -- like Mr. Trevor
6 said yesterday, they might have been limited to 40, but
7 that's enough for me on most grocery store trips even.

8 Q Is this also confirmed in How to Get the Most
9 Out of CompuServe?

10 A Yes.

11 Q Now, you explained to us that Newegg does not
12 add a plurality of respective products in a shopping
13 cart in said shopping cart database, that this takes
14 place on the customer's computer. How do we know where
15 this happens in the CompuServe Mall?

16 A Well, again, the CompuServe environment was
17 one where the client could make selections and choose
18 things, but each such selection results in a message
19 going from the client to the server where that
20 information is stored.

21 So the only way that the personal holding file
22 could be updated each time an item was selected and the
23 O key was hit to order that item would be by adding to
24 the personal holding file for each such selection.

25 Q Are the limitations of this claim taught or

1 obvious to one reading these books?

2 A Yes, they are.

3 MR. GIANNETTI: I object, Your Honor.

4 This sounds like an opinion about the evidence --

5 THE COURT: I'm sorry. What?

6 MR. GIANNETTI: Sounded like an opinion
7 of obviousness. He's expressing opinions of
8 obviousness, and that's not what he's here to do, and
9 it's not in his report.

10 MR. BALDAUF: I beg to differ
11 Mr. Giannetti. We certainly offered these references
12 under both 102 and 103.

13 MR. GIANNETTI: The issue is whether this
14 witness has expressed any opinions in his report. He
15 said specifically when he came to speak to us today he
16 was not going to express he legal opinions. He's
17 expressing an opinion of obviousness, and it's not
18 covered by his report.

19 MR. BALDAUF: I disagree. His report
20 included the contentions. But I can change the
21 terminology if it makes it easier for everybody.

22 THE COURT: All right. Repeat your
23 question.

24 The jury will disregard the last question
25 and answer.

1 Q (By Mr. Baldauf) Mr. Tittel, based upon the
2 teachings of the Using CompuServe book and How to Get
3 the Most Out of CompuServe book, are these limitations
4 taught or apparent based upon these teachings?

5 A Yes.

6 Q Got ahead of myself.

7 Said shopping cart computer being programmed
8 to receive said plurality of shopping cart messages, to
9 modify said shopping cart in said shopping cart
10 database, to reflect said plurality of requests, to add
11 said plurality of products to said shopping cart, and to
12 cause a payment message associated with said shopping
13 cart to be created.

14 What do these references tell us -- sorry.

15 Before I do that, what does this limitation
16 mean?

17 A It means that as you shop, you can pick items,
18 in fact, multiple items, and then when you're ready to
19 stop shopping and start checking out, you can so
20 indicate and be informed as to what is in your shopping
21 cart and what you're going to have to pay for it.

22 Q Do these books explain that the shopping cart
23 was modified in the shopping cart database?

24 MR. GIANNETTI: I --

25 A Yes, they do.

1 Q (By Mr. Baldauf) Does this passage likewise
2 describe a payment message?

3 A The top passage on the page mentions an
4 electronic order form. This is the first step in a
5 payment message. It basically is the point at which
6 you're told what it is that you bought and how much
7 you're going to have to pay.

8 When we saw the movie -- or rather the
9 demonstration yesterday from Mr. Trevor, this was the
10 point at which the selection of items that had been
11 picked showed up, and then we had the option to add,
12 delete, or quit.

13 Q Are the limitations of this clause set forth
14 in the CompuServe books?

15 A Yes, they are.

16 Q Next limitation: Said buyer computer being
17 programmed to receive a request from said user to
18 purchase said plurality of products added to said
19 shopping cart and to cause said payment message to be
20 activated to initiate a payment transaction for said
21 plurality of products added to said shopping cart.

22 A This is the point --

23 Q Sorry. I got ahead of myself. There we go.
24 Okay.

25 A This is the point at which you type checkout

1 and you indicate that you're done with the shopping part
2 and you're ready to start with am I going to actually to
3 buy this and pay for it part. And that's the point at
4 which you get a message that tells you what it is that
5 you have put into your shopping cart and are told how
6 much it's going to cost you to take that stuff and make
7 it yours.

8 Q Again, reading on in Using CompuServe, what
9 does this explain to us?

10 A Well, it tells us that in order to pay for
11 merchandise, we have to identify ourselves so that not
12 only can the merchant come back later and say you are
13 the person who bought this stuff, but also so that they
14 know where to send it.

15 Q Now, is the activation of the payment message
16 simply whatever message is sent to CompuServe computers
17 from the buyer computer until the customer exits the
18 store?

19 A The payment message occurs at the end of the
20 transaction when the buyer confirms the purchase and
21 essentially authorizes a transfer of funds.

22 Q Does Ellsworth disclose that checkout
23 initiates an order completion process during which the
24 shopper can indicate the order is correct?

25 A Yes, that's true.

1 Q Did the CompuServe Mall display a screen after
2 checkout summarizing the customer's payment selections?

3 A Yes, it did.

4 Q Was this screen shot sent from the CompuServe
5 servers?

6 A Yes, it was.

7 Q Was this screen created by the server before
8 it was displayed?

9 A Of course it was.

10 Q After it was displayed, could it be accepted
11 or activated?

12 A Yes.

13 Q Are the limitations of this clause set forth
14 in the Using CompuServe book?

15 A They are met, yes.

16 Q The final limitation: Said shopping cart
17 being a stored representation of a collection of
18 products, said shopping cart database being a database
19 of stored representations of collections of products,
20 and said shopping cart computer being a computer that
21 modifies said stored representations of collections of
22 products in said database.

23 Do you agree with Dr. Grimes that this clause
24 just contains definitions?

25 A Yes. And I believe we've already explained

1 how, by adding items to the personal holding file from
2 the client to the server, we've been involved in using
3 all of these definitions.

4 Q Do these CompuServe books set forth these
5 limitations of this final claim clause?

6 A Yes, they do.

7 Q I would ask you one final question.

8 Mr. Trevor talked yesterday about the
9 internet. Did CompuServe work over the internet?

10 A Well, yes, in a manner of speaking they did by
11 their support for Telenet.

12 But the language of the word internet is
13 pretty interesting in that if you refer to the internet,
14 you're talking about the TCP/IP interconnected global
15 collection of computers that we all know and love. But
16 if you talk about an internet, you're just talking about
17 a network of networks.

18 And I think in the other things that we've
19 looked at in the CompuServe writings, the CompuServe
20 Network definitely interfaced with other networks and,
21 therefore, also meets the definition of an internet.

22 Q Are the asserted claims of the '314 patent
23 shown or apparent based upon the teachings in these
24 books about the CompuServe Mall?

25 A Yes, they are.

1 MR. GIANNETTI: Your Honor, I'm going to
2 object to that belatedly. I don't think the word
3 apparent is appropriate here. It doesn't have any --
4 doesn't have any relationship to any appropriate legal
5 standard.

6 But I think he can ask the question as shown,
7 but I believe the section of his question that referred
8 to apparent should be stricken.

9 MR. BALDAUF: Again, I disagree. Our
10 contentions very clearly set forth that we were offering
11 these references both under 102 and 103.

12 MR. GIANNETTI: If by apparent he means
13 it's shown in there, then I will accept that. But if
14 he's suggesting that this witness is -- is expressing
15 opinions of obviousness, he's expressly testified in his
16 deposition he's not going to do that, and he hasn't
17 formed any opinions.

18 THE COURT: Is he expressing opinions of
19 obviousness?

20 MR. BALDAUF: I was not trying to elicit
21 that, but...

22 THE COURT: Well, let's couch it in terms
23 of whether it anticipates, then, rather than
24 obviousness.

25 MR. BALDAUF: Well, considering he's not

1 a lawyer, how about if I just use something more
2 generic, like matches up, just is it in there.

3 THE COURT: All right. Any problem with
4 matches up?

5 MR. GIANNETTI: That's fine, Your Honor.
6 As long as the word obviousness and opinions of
7 obviousness are kept out.

8 THE COURT: All right.

9 MR. BALDAUF: Okay. I don't want to make
10 this harder than it has to be.

11 Q (By Mr. Baldauf) Okay. Let's talk about the
12 '492 patent. And we can do this much, much more quickly
13 because the whole host of the limitations we just talked
14 about are in these same claims.

15 Quickly, Claim 17, as we have talked about
16 before, is virtually identical to the claim we just
17 talked about. It has a couple of new limitations that
18 aren't in there.

19 The first one: The buyer computer and the
20 shopping cart computer being interconnected by a public
21 packet switched network.

22 Do the CompuServe books disclose that
23 CompuServe and the user computer was interconnected by a
24 public packet switched network?

25 A Yes. All of the networks referred to in that

1 reference are packet switched, and all were available to
2 the public.

3 Q There are two other new limitations in here:
4 A product identifier identifying one of the plurality of
5 products and at least one of which comprises a universal
6 resource locator.

7 And to cause a payment message to be created,
8 the payment message comprising a universal resource
9 locator.

10 So the new thing here is a universal resource
11 locator. What is a universal resource locator?

12 A Actually, it's a uniformed resource locator,
13 and we know it as a URL. It's the address that appears
14 in the address line in a web browser. If I go to
15 www.microsoft.com, that www dot so forth and so on is a
16 URL.

17 Q Was this use of URLs new with the filing of
18 this patent?

19 A No. In fact, the hyper in hypertext comes
20 from the use of URLs and links.

21 Q Was -- were URLs invented by Open Market?

22 A No. They were invented by Daniel
23 Berners-Lee -- I'm sorry, Tim Berners-Lee and his
24 colleagues at CERN in '89 and '90 as the first
25 implementation of html and http was created.

1 Q Are the limitations of Claim 17 of the '492
2 matched up by the CompuServe Mall teachings and basic
3 internet URL functionality?

4 A Anyone who wanted to move shopping to the web
5 would know they had to use URLs to tie things together
6 to deliver information.

7 Q Okay. Moving on to Claim 15. And I'm going
8 to move through this pretty quickly because a lot of
9 these limitations are the same.

10 Hypertext statement system. What is a
11 hypertext statement system?

12 A A hypertext statement system is a linked
13 collection of html documents that represent a statement.

14 Let's talk about a bank statement. You might
15 have a page that has your savings account, your checking
16 account, and your money-market account on it; and then
17 you could click on a link for your checking account and
18 see your transactions for the last month. That's how my
19 bank account works online anyway.

20 Q Okay. So -- you were here yesterday for
21 Mr. Treese's testimony?

22 A Yes, I was.

23 Q Do you agree with him that hypertext, like a
24 URL, is just a basic functionality of the internet?

25 A Of the worldwide web.

1 Q I'm sorry, of the worldwide web?

2 A Yes, it is.

3 Q I keep doing that.

4 And I just pulled out a reference here to the
5 prior art Gifford patent. It just discusses the use of
6 hypertext.

7 A Yes.

8 Q With respect to a lot of these limitations
9 now: A client computer for operation by a client user.

10 And we talked about that in the '314 patent.

11 Is this the same here?

12 A Yes, it is.

13 Q One or more server computers for operation by
14 a server user.

15 Again, same as in the earlier claim. Is it
16 the same here?

17 A Yes, it is.

18 Q The client computer and the server computers
19 being interconnected by a public packet-switched
20 computer network.

21 Actually, this is the limitation we just
22 talked about in Claim 17. Is this likewise taught in
23 the CompuServe Mall book?

24 A Yes, it is.

25 Q Okay.

1 At least one of the server computers being
2 programmed to record information pertaining to purchase
3 transaction records in a database, and to transmit a
4 statement document comprising the purchase transaction
5 records to the client computer over the network.

6 Now this one certainly is different.
7 Could you please refer to this portion of Using
8 CompuServe and explain to us what this teaches?

9 A Absolutely.

10 You will notice in the first paragraph that,
11 when you finish an order and you indicate it's correct
12 and complete, you get something called a confirmation
13 number. That confirmation number is a unique identifier
14 that corresponds to your transactions so that you can
15 look it up anytime you want to in the future and get all
16 the information about that transaction that you might
17 ever need.

18 To any competent programmer, the ability to
19 access a record by a unique identifier means that they
20 know how to find it, and once they've got it in their
21 hands, they can take it and slice it and dice it any way
22 they want to.

23 Q What do the -- what does this passage teach
24 about recording transaction records in the database and
25 transmitting a statement document to a client?

1 A It describes the mechanisms of causing a
2 statement to appear in a hypertext system.

3 Q There's no hypertext system here, is there?

4 A Well, okay. It describes how to access
5 information about a transaction.

6 Q Now, what is a statement document?

7 A Well, we all get bills, right? A statement
8 document is like a bill. It has your name and address
9 on it. It has the company that's sending you the bill.
10 It has an itemized list of charges and taxes and fees
11 and ya-da, ya-da, ya-da, and then there is a number that
12 you've got to pay the note for.

13 Q Is this portion of the claim set forth in the
14 using CompuServe reference?

15 A Yes, it is.

16 Q Next limitation: The client computer being
17 programmed to display the statement document, to receive
18 a request from the client user, to display transaction
19 details corresponding to a portion of the statement
20 document displayed by the client computer, and to cause
21 a transaction detail hypertext link corresponding to the
22 portion of the statement document to be activated.

23 What does Using CompuServe -- I don't want to
24 talk about hypertext right now -- but what does Using
25 CompuServe tell us about the other portion of this claim

1 limitation?

2 A Well, it tells us that we have a way to get at
3 that information. It doesn't tell us anything about how
4 that information gets displayed.

5 And, of course, since CompuServe didn't have
6 hypertext, it couldn't use hypertext for display either.

7 Q And, again, what is hypertext?

8 A Hypertext is, in the case of html, it's a
9 markup language that you use to create web pages.

10 Q Does this limitation match up with the
11 teachings in the Using CompuServe book as well as the
12 basic operation of the worldwide web?

13 A Anyone who could get access to the text in a
14 transaction record would understand how to use html to
15 present that information at a variety of levels of
16 details. That's how they do it for my bank account.

17 That's how you do it for just about any kind
18 of statement.

19 Q And again, is the use of html -- I don't want
20 to say it was invented there, but at least described in
21 the prior art Gifford patent?

22 A Yes.

23 Q A final limitation: At least one of the
24 server computers being programmed to respond to
25 activation of the transaction detail hypertext link by

1 transmitting the transaction details to the client
2 computer over the network as a transaction detail
3 document.

4 What is this explaining to us?

5 A Well, this is basically how you drill down
6 from a higher level of detail in a document to a lower
7 level of detail in a document.

8 To go back to my bank account example. When
9 you click on the line that corresponds to your checking
10 account, you see your checking account deposits and
11 withdrawals for the last 30 days. That's exactly what
12 this refers to here.

13 Q Is this set forth in the basic use of
14 hypertext?

15 A Yes. It's inherent in the basic use of
16 hypertext.

17 Q Do the asserted claims in the '492 patent
18 match up with the teachings of the CompuServe books and
19 basic internet functionality and just plain common
20 sense?

21 A Yes, they do.

22 Q Okay. I'd like to move on to the session ID
23 patent. And I have in front of you right now on the
24 screen U.S. Patent No. 5560008 to Johnson, who was an
25 IBM employee. This is actually an IBM patent filed

1 May 15th, 1989.

2 Could you read this language and explain to us
3 what it means?

4 A Certainly.

5 Here's how it goes: A message, called a
6 request for service, is sent from the user client
7 machine to the server remote machine anytime the service
8 is needed on the remote machine. The request for
9 service contains enough information to insure that the
10 remote user is authorized to use the server and the set
11 of credentials and capabilities the user is to have when
12 using resources on the server machine.

13 The server builds a set of credentials that
14 represent all of the interesting security facts about
15 that remote user. This information includes the user
16 ID, the group ID that the user is in, the group set of
17 other group IDs that the user has access to, an account
18 ID, the set of privileges of the user that allow the
19 user to bypass the normal security restrictions on the
20 system, and so forth.

21 The server establishes all of the credentials
22 for the user, and stores this information in a data
23 structure called the credential structure, and returns a
24 small value, for example, 64 bits, to the client machine
25 where the user is running. This returned small value is

1 referred to as the credentials identifier.

2 Q So please explain to us what that means.

3 A Well, I believe this patent is in connection
4 with the IBM OS/2 Warp server, which was one of the
5 network operating systems that was available along with
6 Novell Netware and 3Com's 3 Server at the time. And it
7 basically describes: How do I log on to a network
8 server over a network?

9 I present my credentials, I get checked out,
10 my rights and permission gets established. All my
11 information gets set up so that I can make subsequent
12 access. And then I get an identifier back that allows
13 me to skip going through the authentication and
14 authorization part the next time I talk to that server.

15 Q And how was this similar to the session ID
16 that we've been discussing?

17 A The same mechanisms that are used to set up a
18 network log-in, apply to establishing a session.

19 Q Let's now turn to the specific limitations of
20 Claim 1 of the '639 patent and show how they match up
21 with Johnson, or the Johnson IBM patent.

22 A method of processing service requests from a
23 client to a server system through a network.

24 What does Johnson explain to us about this?

25 And if you could read the text.

1 A It basically tells us that there is a way of
2 sending messages from the client to server to make a
3 request for service, which is the same thing as a
4 service request.

5 Q So you're saying that a service request is the
6 same thing as a request for service?

7 A Yes, I am.

8 Q Said method comprising the steps of forwarding
9 a service request from the client to server system.
10 Johnson provides that a message, called a request for
11 service, is sent from the user client machine to the
12 server remote machine anytime that service is needed on
13 the remote machine.

14 What does this tell us?

15 A It tells us that when the client wants
16 something, it has a way to ask the server for it.

17 Q Does this disclose this limitation of Claim 1?

18 A Yes, it does.

19 Q Next limitation: Where communications between
20 the client and server system are according to hypertext
21 transfer protocol.

22 Now, will you acknowledge that Johnson does
23 not disclose -- disclose hypertext transfer protocol?

24 A Johnson doesn't disclose any protocol in his
25 patent.

1 Q Again, is hypertext transfer protocol the
2 basic protocol of the web?

3 See, I got it right that time. I didn't say
4 internet.

5 A Thank you.

6 Http is how you get things done between
7 clients and servers on the web.

8 Q Does basic internet functionality, as well as
9 the disclosure in the Gifford patent, disclose the use
10 of hypertext transfer for communications between
11 computers on the web?

12 A Yes.

13 Q Returning a session identifier from the server
14 system to the client, the client storing the session
15 identifier for use in subsequent distinct requests to
16 the server system.

17 A That's the small value that gets returned to
18 the client machine. That's the ticket that says, hey,
19 you know me; I don't have to jump through all those
20 hoops so we can talk.

21 Q So is this limitation disclosed in Johnson?

22 A Yes, it is.

23 Q And finally: And appending the stored session
24 identifier to each of the subsequent distinct requests
25 from the client to the server system.

1 Is this limitation likewise shown in the
2 Johnson IBM patent?

3 A Yes. It says you must present the credential
4 identifier to the server in every request.

5 Q Now. We've heard a lot of testimony
6 throughout this trial directed to the fact that Claims
7 78 and 79 are virtually identical to Claim 1 with the
8 addition of a couple limitations.

9 I don't want to spend any more of the jury's
10 time than I have to on this hypertechnical stuff.

11 However, does the text of Johnson itself
12 likewise match up with all the limitations of Claim 78
13 and 79?

14 MR. GIANNETTI: Your Honor, I object. 78
15 and 79 were the subject of the motion in limine. I
16 don't believe this is really consistent with the ruling
17 on that motion.

18 MR. BALDAUF: Your Honor, we had this
19 argument last Monday.

20 THE COURT: All right. Counsel,
21 approach.

22 I tell you what. We have been going for
23 almost an hour and a half. Why don't we go ahead and
24 take a 15-minute break. We will be in recess until --
25 actually we've been going almost two hours. So y'all

1 have been very patient.

2 Are you about through with this witness,
3 Counsel?

4 MR. BALDAUF: This was actually my last
5 question.

6 THE COURT: I'm afraid to recess because
7 I'm afraid you'll think of three or four more.

8 So, Counsel, approach the Bench and let's
9 see if we can deal with this very quickly.

10 (Bench conference.)

11 MR. GIANNETTI: Your Honor, here is the
12 issue. Your Honor, at the motion in limine hearing,
13 there was an issue as to these two claims, 78 and 79.
14 They were not covered in their expert report. And I
15 believe Mr. Baldauf will agree to that.

16 So the Court ruled that Mr. Baldauf --
17 Mr. Baldauf made the representation that they are very
18 similar to Claim 71 --

19 MR. BALDAUF: Claim 1.

20 MR. GIANNETTI: -- Claim 1, excuse me.

21 And, in fact, they are, except they do
22 contain some additional limitations.

23 So Your Honor's ruling was that --

24 THE COURT: He didn't cover it in his
25 report?

1 MR. BALDAUF: He did not. If I may, Your
2 Honor. We discussed this in the motion, and this is the
3 claim that was set forth in our supplemental invalidity
4 contentions that they have had since August. And as I
5 explained to the Court, we're doing a reference in Claim
6 1 --

7 THE COURT: You can do that, but you
8 can't do it with this witness if he didn't cover it in
9 his report. Did he cover it in his report?

10 MR. GIANNETTI: No, he did not.

11 MR. BALDAUF: Not this specific claim,
12 no, because this is one that was added later and was not
13 part of --

14 THE COURT: Claim 3?

15 MR. BALDAUF: It was briefly before his
16 report --

17 MR. GIANNETTI: Briefly before. We gave
18 additional notice and gave additional time to prepare
19 the report, we added the claims. We said we will give
20 you more time for the report, and they still didn't --

21 THE COURT: All right. Sustain the
22 objection.

23 (Bench conference concluded.)

24 THE COURT: All right. Any more
25 questions for this witness, Counsel?

1 MR. BALDAUF: No, Your Honor.

2 THE COURT: All right. Now we will take
3 our break, and then we will come back and have
4 cross-examination.

5 So enjoy your break until 10:40.

6 We will be in recess.

7 COURT SECURITY OFFICER: All rise.

8 (Recess.)

9 COURT SECURITY OFFICER: All rise.

10 (Jury in.)

11 THE COURT: Please be seated.

12 All right, Mr. Giannetti. You may
13 proceed.

14 MR. GIANNETTI: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. GIANNETTI:

17 Q Good morning, Mr. Tittel.

18 A Good morning, Mr. Giannetti.

19 Q And hello again.

20 A Nice to see you again, too, sir.

21 Q Mr. Tittel, I believe you testified that this
22 is a first. I believe you testified that this is the
23 first court appearance that you've made as an expert
24 witness?

25 A Yes, it is.

1 Q And in fact, this is the first case that
2 you've worked on as an expert?

3 A Yes, it is.

4 Q Would you agree that you might do some things
5 differently if you had to do them again?

6 A Yes.

7 Q Okay. Well, let's talk about a few of those
8 things.

9 You prepared an expert report in this case.
10 Do you recall that? In fact, you prepared several.

11 A Yes, sir, I did.

12 Q Let's talk about the first one which dealt
13 with the issue of prior art in the patents; is that
14 correct?

15 A Yes.

16 Q So in preparing your report, isn't it true
17 that you did not use the Court's claim constructions?

18 A I was aware of the Court's claim
19 constructions, and I used the Court's claim
20 constructions -- by and large, I did -- not knowing I
21 was not allowed to take issue with the definition of a
22 database.

23 Q Well, I believe you testified that you
24 interpreted the claims in light of your own knowledge of
25 computer science. Isn't that what you did when you

1 prepared your first report?

2 A That's what I said in my deposition, yes, sir.

3 Q And didn't you also fail to follow an
4 element-by-element approach in analyzing the claims in
5 that report?

6 A I paid attention to the elements in the claim.
7 When I worked through the initial set of materials for
8 my expert report, I looked at all the claims, but I only
9 ended up focusing on those claims where I felt there was
10 some chance of making an argument against them.

11 Q My question is, did you prepare an
12 element-by-element comparison --

13 A No.

14 Q -- of the claims to the prior art?

15 A No, sir, I did not.

16 Q You didn't do that, right?

17 A No, sir.

18 Q That's something you might do if you had to do
19 this again?

20 A Perhaps, yes.

21 Q And, in fact, you couldn't even recall if you
22 saw the Court's claim constructions before you wrote
23 your first report; isn't that right?

24 A Yes, sir, that is correct.

25 Q And I believe you talked about that the

1 database issue -- you used a definition of database that
2 was not consistent with the Court's claim construction;
3 is that right?

4 A Yes, I did.

5 Q That was what you called a fully-fledged
6 database in your prior testimony at deposition?

7 A Yes. It's the kind of database we heard
8 Mr. Stewart talk about in his deposition as one that
9 meets the acid criteria.

10 Q And that's something you wouldn't do again, is
11 it?

12 A No, sir.

13 Q And you also -- in your second report,
14 however, you used a more relaxed definition of database;
15 isn't that right?

16 A I followed the Court's claim construction,
17 sir.

18 Q I thought you referred to that as a more
19 relaxed definition.

20 A That's what I -- that's what I called it.

21 Q So you used the more relaxed definition in
22 your second report, which dealt with infringement, and a
23 more rigorous definition in your first report, which
24 dealt with prior art; is that right?

25 A I don't believe those arguments have survived

1 to this point of the trial, sir.

2 Q I'm just asking you what you did in
3 preparation --

4 A Okay. That's what I did. I'm sorry.

5 Q Okay. And another thing that you did was that
6 you accepted an analysis of the claims in the prior art
7 prepared by Newegg's attorneys. I think you referred to
8 that in your direct examination; isn't that right?

9 A Yes. I incorporated the invalidity
10 contentions that I obtained from the Newegg lawyers.

11 And my reason for doing so was that there were
12 a great many references that we had to go through and
13 find supporting information for, and this helped me make
14 that search a great deal easier.

15 Q Is that something you think you would do
16 again, or would you do your own analysis?

17 A Well, I did do my own analysis. I was very
18 careful to review not only the material that was
19 presented in the invalidity contentions but also the
20 material that surrounded it. And if I hadn't agreed
21 with what was presented, I wouldn't have included it.

22 Q Well, let's take that a step further, if we --
23 if we may.

24 When you accepted that analysis that had been
25 prepared by Newegg's attorneys, you didn't know whether

1 they had used the Court's claim constructions or some --
2 someone else's; isn't that right?

3 A Unlike myself --

4 Q Isn't that correct, sir?

5 A No, it's not correct.

6 Q Isn't that what you testified at your
7 deposition?

8 A I don't remember saying words to that effect.

9 Q Take a look at Page 97 of your deposition.

10 A Okay.

11 Q Do you have that in front of you?

12 A Yes, I do.

13 Q Okay.

14 A Would that be the validity deposition?

15 Q It would be the first one.

16 A Okay. Page 97.

17 Okay. Would you please point out to me --

18 Q Yeah. I'm looking for it, sir.

19 A Oh, I'm sorry.

20 Q Okay. I'm sorry. Page 99.

21 A Oh, okay. Well, that's why I --

22 Q I put you on the wrong page.

23 A -- was confused about the page. Okay.

24 Q And you talk in there about the -- at Line 14,
25 you're talking there about the materials that were

1 prepared by Newegg's counsel.

2 And here's the question I asked you: Do you
3 know for a fact whether the Court's claim constructions
4 were used in preparing these documents?

5 And you said: I do not, sir.

6 A At the time that I answered that question, I
7 was not aware of it.

8 Q Okay. So you prepared a report in this case
9 and you testified at the deposition based upon a set of
10 analyses, and you weren't sure whether the Court's claim
11 constructions had been used at that time; is that right?

12 A That's what I said, yes, sir.

13 Q Okay. Now, another thing that you didn't
14 do -- and I think you mentioned this in your direct
15 examination -- is that when you prepared your report in
16 this case and formed -- and appeared for your first
17 deposition, you didn't review the Patent Office file,
18 the prosecution history for the patents involved in this
19 case, did you?

20 A No, sir, I did not.

21 Q And that's something you would certainly do if
22 you did this job again, wouldn't you?

23 A Yes, sir, it certainly is.

24 Q All right. And another thing that you didn't
25 do is that you didn't review all the prior art that was

1 considered by the Patent Office.

2 A I was already familiar with a fairly major
3 portion of the prior art, and I certainly felt like I
4 knew enough about the prior art to create a background
5 against which to evaluate the claims.

6 Q Yeah. But you didn't systematically review
7 all the prior art that was before the Patent Office, did
8 you?

9 A Given the very large number of items listed in
10 the prior art list, I'm not sure that I would have had
11 time to do it.

12 Q Was it a matter of time?

13 A Not necessarily.

14 Q Is that something you think you would have
15 done if you had more time?

16 A Yes, I do.

17 Q And if you had to do this again, you would do
18 that, wouldn't you?

19 A Without fail.

20 Q Now, I think at the beginning of your
21 testimony, you said that you understood your role here.

22 Your job for today was to explain the patent,
23 that you were to review the patents and explain them.

24 A Yes, sir.

25 Q You didn't say anything about rendering any

1 opinions about obviousness, did you?

2 A No, I did not.

3 Q And, in fact, you did not understand your role
4 here, and you did not come prepared here today to render
5 any such opinions, did you?

6 A I am definitely prepared to talk about matters
7 related to how the technology, methods, and systems
8 described in the patents play against the general
9 background of internet technology in the timeframe of
10 '94, '95, and the filing dates of patents.

11 Q But you're not here really to give your
12 opinions on obviousness, are you?

13 A I believe, if I'm asked questions that relate
14 to what a person of ordinary state (sic) in the art
15 could do under the circumstances, that I could provide a
16 meaningful answer.

17 Q At the time of your deposition, you didn't
18 understand that to be your role, did you?

19 A No, sir.

20 Q In fact, just to expand that a bit, the whole
21 subject of validity, that's not something that you've
22 come here prepared with an opinion to express; is that
23 true?

24 A No, that's not true, sir.

25 Q So you're an expert -- you believe you're an

1 expert on patent law and validity?

2 A No. I believe that my expert opinions can
3 shed light on matters of validity. I don't think I can
4 decide matters of validity.

5 Q Okay. Let's take a look at the claim charts
6 that you testified about in the first part of your
7 testimony when you were discussing the comparison
8 between the patent claims and the Newegg system.

9 The first thing that you talked about was
10 Claim 34 of the '314 patent. I've put it up there on
11 the easel.

12 A Yes, sir.

13 Q Now, you recognize that this claim is what
14 they call a system claim?

15 A Yes, sir, I do.

16 Q Okay. And it says that. Right -- right at
17 the beginning, it says: A network-based sales system
18 comprising, correct?

19 A Yes, it does.

20 Q And is there any doubt in your mind that
21 Newegg uses their sales system to sell products?

22 A No, there isn't.

23 Q Okay. So when you talked about these various
24 elements of the claim -- for example, you said the buyer
25 computer, that's something that's not part of Newegg --

1 you weren't saying that they don't use a -- a
2 network-based sales system.

3 You weren't saying that Newegg does not use a
4 network for sales, were you?

5 A No, I was not.

6 Q Okay. And while you mentioned that the buyer
7 computer was something that they didn't use, isn't it a
8 fact that once someone accesses the Newegg website,
9 Newegg sends messages to that computer concerning --

10 A Yes, sir.

11 Q -- concerning selling products?

12 A Yes, that's true.

13 Q And you don't consider that to be using that
14 computer by Newegg to sell its products?

15 A No, sir. I don't necessarily consider that
16 use.

17 Q Well, you mentioned something about free will
18 or maybe your counselor did.

19 Yes, it's true that once someone -- that the
20 decision whether to access the website may be up to the
21 customer, but once the customer gets on the website,
22 wouldn't you agree that the choices are limited by that
23 information which is presented by Newegg?

24 A The choices that appear on the web page are a
25 direct reflection of the contents of the html documents

1 that are delivered to that page.

2 Q And those --

3 A But in addition to the choices that appear on
4 that page, the user always has the option to bail out.
5 They don't have to do anything. They can close the
6 browser and go do something else. That's the free-will
7 element, I think.

8 Q Just -- just to use a brick-and-mortar
9 comparison, if I may. You always have the choice
10 whether to shop at Macy's or some other store; but once
11 you're in the store, you have to choose from among the
12 products that Macy's provides.

13 And that's -- isn't that the same with Newegg?

14 A Well, you -- you always have the option of
15 heading for the door anytime you don't want to shop.

16 Q And that's true, also, with the website, isn't
17 it?

18 A Of course it is.

19 Q So it's really no different than a
20 brick-and-mortar store in that respect, is it?

21 A Except for the fact that I can get into that
22 store from my living room or in my pajamas or maybe even
23 in some other condition, absolutely.

24 Q Well, I'll accept that difference. I think
25 from the point of view of my comparison, I don't think

1 that makes a difference, but I will accept that.

2 Okay. So let's talk about the other elements
3 of this claim that you mentioned.

4 In 34(f), I think you -- you focused on the
5 word respective; is that right?

6 A Yes, I did.

7 Q And you said that that is what suggested to
8 you that there had to be a one-to-one updating of the
9 database, as you put it, each time a product was -- was
10 selected; isn't that right?

11 A Well, if -- if you wanted --

12 Q Isn't that right, sir?

13 A Well, may I make a qualification or --

14 Q Well, first, answer my question.

15 A Yes, but that fails to take the possibility of
16 deletion or change into account.

17 Q Of what? I'm sorry?

18 A Change, as in change of quantity, or deletion,
19 as in removal of an item, into account.

20 Q Okay.

21 A You could do all of those things.

22 Q But you -- but the word respective is critical
23 to your analysis on this particular point, isn't it?

24 A Absolutely.

25 Q In fact, your whole analysis of this turns on

1 the word respective.

2 A I wouldn't say the entire analysis hinges on
3 it, but a part -- a portion of it certainly does, yes.

4 Q The piece of it that relates to the updating
5 of the database turns on the word respective, correct?

6 A Yes.

7 Q Okay. Now, the Court hasn't construed this
8 term; isn't that right?

9 A I'm sorry. Would you repeat the question?
10 I'm having a little trouble hearing you.

11 Q The Court has not construed this term. It's
12 not in the Court's claim construction that you have
13 before you, is it?

14 A No. Respective is not in there. I checked.

15 Q So you picked the definition for that; isn't
16 that true? You interpreted that in a certain way, the
17 Ed Tittel interpretation of that.

18 A Well, actually, what I did was I thought about
19 the way in which I heard it used in ordinary discourse,
20 and I figured that since it wasn't part of the claim
21 construction, that the rules of ordinary discourse would
22 apply.

23 Q Do you believe that opinions can differ as to
24 that meaning?

25 A I beg your pardon, sir?

1 Q That opinions can differ as to that meaning?

2 A Again, I'm having trouble hearing what you're
3 saying.

4 Q That opinions can differ as to the meaning of
5 that term. Would you -- would you concede that they
6 can?

7 A Opinions can always differ, but common
8 understandings are also common understandings.

9 Q Okay. You're not pointing to any dictionary
10 definitions or any authoritative sources that you're
11 aware of, are you?

12 A No, I'm not. I didn't think it was necessary.
13 I think I know what the word means.

14 Q Okay. Well, what -- what about the
15 possibility that there is a one-to-one correspondence
16 between requests and products? Isn't that another
17 possibility for the word respective?

18 A No, that is not another possibility. That is
19 exactly what I was trying to say.

20 Q At least not in your view of that term?

21 A I'm confused. I don't understand -- I think
22 I've agreed that, to me, respective means not
23 necessarily one to one in the sense of item for item,
24 but it does mean one to one in the sense of action for
25 action, so that for each addition to the shopping cart,

1 there is a change to the database; for each deletion
2 from the shopping cart, there is a change in the
3 database; for each change in quantity, there's a change
4 to the database.

5 That's the sense that I meant respective.

6 Q Well, how about this interpretation: For each
7 request, there is a product? Isn't that an equally
8 viable definition or an equally applicable one?

9 A I don't think so.

10 Q Okay. Well, so you differ in opinion with --
11 with Dr. Grimes; is that right?

12 A Yes, I do.

13 Q But you can't point to anything specific that
14 support your opinions, can you?

15 A Other than a common understanding of the
16 English language, no, sir.

17 Q But you will admit that if your interpretation
18 of that term is incorrect, then your analysis that
19 follows from it is wrong; isn't that true?

20 A Certainly.

21 Q Now, the next element is 34(h), and that has
22 to do with modifying the shopping cart in the shopping
23 cart database; that's correct?

24 A Yes, sir.

25 Q So you're not quibbling with the idea that

1 Newegg modifies a shopping cart; is that correct?

2 A No. It has to modify the shopping cart in
3 order to reflect the shopping activity.

4 Q Okay. But your -- your issue with this is
5 that the modification does not take place in the
6 shopping cart database.

7 A Yes, that's precisely correct.

8 Q Okay. And -- and your -- and you're saying --
9 you -- you're -- you do recognize that -- that in
10 checkout, once the checkout has taken place, once the
11 customer has chosen to check out, you do recognize that
12 shopping cart database has changed in some way.

13 A Well, I have an issue with the word
14 modification, sir, and it has to do with the meaning of
15 the word modification in standard database terminology
16 and also as it appears in the claim constructions for
17 this suit.

18 Q Okay. We're going to take a look at the slide
19 that I think you focused on when we got -- when you got
20 into this discussion --

21 A Okay.

22 Q -- with Mr. Baldauf on direct.

23 Okay. And you say that in this instance, the
24 database is not -- it is not modified. The situation --
25 this shows checkout once the checkout button has been

1 activated; is that correct?

2 A Yes, sir.

3 Q Okay. And at that point, what happens is that
4 the contents of the cookie relating to the product are
5 moved into a database, correct?

6 A Yes, that is correct.

7 Q Okay. And so the issue is whether that is a
8 modification of the database or whether it is, in your
9 terms -- you called it an instant --

10 A Instantiation, yes, sir.

11 Q And you think that's an important difference;
12 is that right?

13 A Yes, I think it's an important difference
14 because the way in which databases are described and the
15 way in which the language for the definition of modify
16 is described, modify specifically says to change an
17 instance, and instantiation means to create an instance.

18 Now, to change an instance means that
19 something already exists and you're doing something to
20 make it different.

21 Instantiation means nothing exists and you're
22 creating it. I think those two things are very
23 different, and I believe that most database experts
24 would agree with me on that.

25 Q Well, let's -- let's just talk about your

1 opinions, if you will, and we'll see how they play out.

2 A Yes, sir.

3 Q Take a look at that diagram again. And that
4 big cylindrical thing at the bottom, that's the
5 database, right?

6 A Yes, it is.

7 Q And that diagram shows something called a cart
8 ID; isn't that right?

9 A Yes, it does.

10 Q So the cart ID exists at the point that the
11 information from the cookie is put in it database,
12 right?

13 A The cart ID exists as a value of a counter
14 variable stored as a single integer.

15 Q All right. So there's something in that
16 database?

17 A It's not in the database, sir. It's the value
18 of a variable that belongs to that program. That --
19 excuse me.

20 Q Your slide shows it in the database, sir.

21 A I beg your pardon?

22 Q Your slide shows it in the database?

23 A It enters the database at exactly the same
24 time all the other data does. That's why it's an
25 instantiation.

1 Q But your slide shows the card ID in the
2 database?

3 A No, sir. That can symbol in which the number
4 appears is not a database. That's a file.

5 Q I thought that was the shopping cart database?

6 A No, sir, that is not the shopping cart
7 database. The shopping cart database is below -- I'm
8 sorry. It's below in the center of the screen where we
9 see all the different fields with the pointers going
10 into it.

11 The number with the pound sign item beneath it
12 is a simple program variable. And basically the way it
13 works is, it's like I have a little counter and I'm
14 counting people coming through the door. Every time
15 somebody comes through the door, the count goes up by
16 one, so that if they want a shopping cart they get the
17 number associated with the number on the counter.

18 Q Well, don't you agree that the -- the cart ID
19 is the instance of the shopping cart?

20 A I absolutely do not. A shopping cart is
21 defined as a data structure that includes various kinds
22 of product information and description. And at the
23 point where the counter is incremented, none of that
24 information is present.

25 Q I am going to ask you a question, and I'm

1 going to ask you to try to answer my question.

2 A I beg your pardon?

3 Q The question is simply: Once the cart ID
4 comes into existence, isn't that, in effect, the
5 shopping cart?

6 A No, it is not.

7 Q Isn't that a pointer to where the shopping
8 cart is going to be in the database?

9 A No, sir, it is not. Until that pointer gets
10 inside the database, it has no meaning or value as a
11 database element. At that point -- at the point when
12 the counter is incremented it is a potential pointer to
13 a database. But until the record gets instantiated in
14 the database, it doesn't point to anything.

15 Q Wouldn't you agree that if you add something
16 to something, it's a modification?

17 A A modification of what?

18 Q Of whatever was there originally.

19 A That's such a general question I can't begin
20 to answer it. Can you be more specific, please?

21 Q I'm just saying if there is a shopping cart ID
22 that is used to identify the shopping cart, and to that
23 ID you add information, aren't you modifying?

24 A According to the claim construction, sir --

25 Q I'm just asking the answer.

1 A No.

2 Q So your chart is wrong there where it shows
3 the existence of the cart ID?

4 A No, it's not. Because at that point it's been
5 instantiated into the database. That's what that table
6 of fields that are named cart ID, item, quantity, item,
7 quantity, that represents a record in the database.

8 That's --

9 Q So the cart ID is there, and then the
10 information is added to it. Isn't that what you show in
11 your diagram here?

12 A No, sir. What I show in that diagram, if you
13 look at it carefully, is we have information entering
14 from the left, we have information entering from the
15 right. That information is deposited all at once as the
16 single arrow from the insert shopping cart data and cart
17 ID label clearly shows, and it all hits the record at
18 the same time.

19 We're not first creating an empty record with
20 a shopping cart ID inside it and then dropping shopping
21 cart data into it; we're doing it in all one swell foop
22 (sic).

23 Q In your instantiation theory here that that is
24 not the same as modification, have you pointed to any
25 references here that support that? I haven't seen

1 anything in your testimony to support this testimony.

2 A It's based on a common understanding of the
3 way that databases work.

4 Q You don't have any documents, do you?

5 A I beg your pardon?

6 Q You don't have any documents on that that you
7 brought to court today that you've testified about.

8 A Again, I absolutely cannot hear what you're
9 saying. I am very sorry.

10 Q I'm just saying you don't have any documents
11 on that point, do you?

12 A No, I don't have any documents on that point.

13 Q So let's go on to another element in this
14 case.

15 You -- you mentioned that the buyer computer
16 was programmed, and you gave a more detailed
17 presentation on that later in your testimony. I'm going
18 to come back to that for now in 34(j).

19 But just to discuss the subject generally,
20 isn't it true that html is sent from the server to the
21 buyer computer, html pages?

22 A Absolutely. Yes, sir.

23 Q And your issue is that that's not programming;
24 is that right?

25 A Yes, sir, that's correct. Html is not

1 considered a programming language.

2 Q Okay. We'll come back to that. Hold that
3 thought, but we'll come back to it.

4 A Okay.

5 MR. GIANNETTI: Let's take a look at the
6 '492 patent, if we can. Put that up.

7 Q (By Mr. Giannetti) And '492 raises some of the
8 same issues; is that correct? The buyer computer issue
9 that we just discussed?

10 A Yes, sir.

11 Q And the shopping cart database?

12 A Yes, the shopping cart database.

13 Q And the -- any other points of distinction for
14 that, or is that it?

15 A There's the hypertext statements, which is not
16 included in the previous.

17 Q And that's in another '492 claim, right?

18 A Yes, sir.

19 Q But this claim -- if your theory is about
20 buyer computer and respective and shopping cart
21 database -- if your theories are incorrect or if the
22 jury doesn't accept them, then the same analysis applies
23 to this claim, correct?

24 A That is true, yes.

25 Q Okay. You don't have any further distinctions

1 on this claim; is that right?

2 A No, I have nothing further at this time.

3 Q Now, let's take a look at the next one.

4 MR. GIANNETTI: Very interesting.

5 Claim 17. Do you have a chart for Claim 17?

6 Q (By Mr. Giannetti) I think in your analysis of
7 Claim 15 there was an issue about what was stored --
8 storing and the issue of storing information, storing
9 session identifier.

10 You testified -- when we get the claim up.
11 You testified about the question about who does what in
12 connection with Claim -- I believe it was Claim 15. And
13 there was a question about returning a session
14 identifier for the server system to the client, the
15 client storing the session identifier for use in
16 subsequent requests.

17 A Yes.

18 Q Do you recall that?

19 A Yes, I do.

20 Q And I think your position on that was that the
21 storing function is really done by the -- by the
22 customer's computer; is that right?

23 A Yes, sir.

24 Q And that's something that's out of Newegg's
25 control; is that right?

1 A And that's something that's out of what?

2 Q Newegg's control.

3 A Newegg does not do the storing, sir. The
4 browser on the customer computer does the storing.

5 Q And I think your position was the same for
6 that portion of the claim which talks about appending
7 the storage session identifier. Do you recall that?

8 A Yes, I do. Yes, that's correct.

9 Q Well, isn't it true that this is a mechanism
10 that Newegg takes advantage of?

11 A It's inherent to the behavior of the worldwide
12 web.

13 Q And it's something that Newegg takes advantage
14 of when they designed their system; isn't that?

15 A Yes, it is.

16 Q And so to say that it's -- it's done by the
17 client, isn't it true that it is really done by the
18 client because of the information that's sent by Newegg?

19 A Yes, but it still happens as a result of
20 computer executions that are carried out on the client
21 computer.

22 Q Okay. I think we have the claim up.

23 Returning the session identifier from the
24 server system to the client and appending the storage
25 system identifier.

1 Do you recall that analysis?

2 A Yes, sir.

3 Q This is the portion of the claim I'm talking
4 about.

5 All right. This information is sent -- there
6 is information sent from the server to the client that
7 basically directs the client to set the cookies; isn't
8 that true?

9 A Yes, that's true.

10 Q The client would not create the cookie or set
11 the cookie and change it if it were not for instructions
12 that were received from Newegg; isn't that true?

13 A Yes, that is true.

14 Q So when you say that this is -- these steps
15 are being performed by the client, they're being
16 performed by the client in response to instructions sent
17 by Newegg?

18 A Those instructions are sent by Newegg, but the
19 client computer is still the one that carries them out.

20 Q Without those instructions, the client
21 computer with not carry those steps out, would it?

22 A No, it couldn't.

23 Q Computers don't have free will, do they?

24 A Not in any likable way.

25 (Laughter)

1 Q I agree with that.

2 Another step that you talked about -- this is
3 in '639 Claim 1 -- was the step of forwarding a service
4 request from the client to the server, that's step 1(a)?

5 A Yes, sir.

6 Q Forwarding service request, do you see that?

7 It's up on the screen.

8 A Yes, I do.

9 Q And I think your testimony was that that is,
10 again, something that is -- is performed by -- it's not
11 performed by Newegg; is that right?

12 A A party other than Newegg, yes.

13 Q Have you changed your mind about that since
14 your expert report in this case?

15 A Well, here we are again in some murky waters
16 related to the basic behavior of the internet.

17 Q So let me show you your expert report, and you
18 tell me whether you changed your mind about that.

19 Bear with us for a minute.

20 So here's the -- here's the step that we're
21 talking about: Forwarding the service request from the
22 client to the server.

23 And when you prepared your expert report, you
24 said the step is performed by the server.

25 A That was an error on my part, sir. So, yes, I

1 have changed my mind. And I will be happy to explain
2 why.

3 Q Well, I'm just happy that you will admit that
4 you made another mistake, but I don't need to have an
5 explanation.

6 A Very good. Thank you, sir.

7 Q But I do want to ask you a question. You
8 heard Dr. Grimes' testimony; is that right?

9 A Yes, sir.

10 Q You were here when he testified?

11 A Yes, sir.

12 Q There's something called a netscaler in the
13 Newegg system. Are you familiar with that?

14 A Yes, I am.

15 Q And doesn't that forward the service request?

16 A There's no way on any well-built network on
17 the internet for a packet to make it off the internet
18 and into a private network without going through a
19 firewall or some other device to make sure it's not
20 going to blow up when it gets inside your network.

21 That's why I said it's an inherent behavior of
22 the internet.

23 Q So your testimony would be that the netscaler
24 does forward?

25 A Yes, the netscaler does forward, but it's not

1 the only thing that forwards. And if it were not for
2 all the other forwards starting at the client and going
3 through the cloud, the information could not get there.

4 Q So you agree with Dr. Grimes' analysis on this
5 point that the netscaler, which is under Newegg's
6 control, forwards?

7 A Once the packet hits the Newegg network
8 boundary, then, yes, Newegg is forwarding the packet.

9 Q Let's move on to the issues of validity that
10 you talked about.

11 I think one thing -- you were here yesterday
12 when Dr. -- Mr. Trevor testified, weren't you?

13 A Yes, I was.

14 Q And you heard him repeatedly say that
15 various -- various pieces -- well, let's put it this
16 way. You heard him say repeatedly that there were
17 things that he could not find in the three books, the
18 books on CompuServe that you testified about, right?

19 A I'm not sure what you're saying, sir. Could
20 you repeat it?

21 Q Well, I asked him a series of questions about
22 things that were available in CompuServe, and he
23 answered that they were not -- that they were described
24 in CompuServe, and he said they were not there. For
25 example, the term shopping cart didn't appear in any of

1 those three manuals that you talked about; is that
2 right?

3 A Yes, that is correct, yes.

4 Q And, in fact, do you agree with Dr. Trevor, or
5 Mr. Trevor, that the manuals that you testified about
6 don't show how to implement the shopping cart?

7 A No, they do not.

8 Q And you also testified that the messages that
9 go from the client to the server that you testified
10 about are not shown there; isn't that right?

11 A No, the messages are not shown, that's
12 correct.

13 Q And, in fact, the books themselves don't show
14 how to implement the database that you talked about?

15 A No, they don't.

16 Q He said that, and you agree with him?

17 A I do agree with him.

18 Q And that the personal holding file that you
19 equated to the database -- to the shopping cart --

20 A Yes, sir.

21 Q -- that is -- the implementation of that isn't
22 shown either?

23 A No, no implementation is shown.

24 Q What you said was that -- you used the term
25 reverse engineering. You said these manuals or these

1 books could be reverse engineered and people could
2 figure out how to do these things; isn't that what you
3 said?

4 A Yes, sir, that is what I said.

5 Q Isn't it true that when people talk about
6 reverse engineering they're usually talking about a
7 physical device, like a piece of software or a computer?
8 Isn't that what people are usually talking about?

9 A My understanding of reverse engineering refers
10 to an ability to recreate a system or to create a system
11 with similar functionality as to what we might call the
12 inspiring system or the original system.

13 I don't think it has to come from a piece of
14 hardware or a piece of software. I think it could come
15 from a specification or even from an understanding of
16 how a system behaves.

17 Simply knowing that you can do something like
18 store information about purchases means that a competent
19 programmer can figure out how to do it.

20 Q If there's something not described there, for
21 example, the database, what is there to reverse
22 engineer?

23 A A -- a qualified programmer would understand
24 that because the CompuServe Mall supported --

25 Q Sir, would you answer my question?

1 What is there to reverse engineer if there is
2 nothing there?

3 MR. BALDAUF: Your Honor, he was
4 answering the question.

5 THE WITNESS: I was answering the
6 question.

7 MR. GIANNETTI: I don't think he was,
8 Your Honor.

9 THE COURT: All right. Restate your
10 question.

11 Q (By Mr. Giannetti) My point is: If there is
12 no description of the database, how could the reverse
13 engineer or the programmer use the information in there
14 to build a system?

15 A They could infer from the visible behavior of
16 the system that numerous other components were present
17 in the background, even though they might not have been
18 directly obvious or explicitly described.

19 Given a system where you have multiple
20 concurrent users and you want to manage data for them,
21 the accepted best practice in the industry since the
22 1970s has been to use a database for that kind of use.

23 Q Well, we've talked in this case about various
24 ways of implementing shopping carts; is that right?

25 A Yes, we have.

1 Q So what is there about the description in
2 those books that would necessarily tell someone how to
3 implement a shopping cart in a particular way?

4 A I believe I answered that question with my
5 previous answer.

6 Q You're saying that the descriptions in there
7 are so clear that they would point to one particular
8 implementation for a shopping cart?

9 A No. What I am saying is I think they would
10 suggest a number of reasonable possible implementations,
11 and that, for reasons of efficiency and security and
12 reliability, that it would make sense to consider a
13 database among those alternatives.

14 Q But no one particular way; is that right?

15 A No, sir, no, definitely not.

16 Q Now, were you here when Mr. Wu testified?

17 A Yes.

18 Q Do you think he knows a little bit about
19 programming E-commerce systems?

20 A Yes, I do.

21 Q My memory isn't a hundred percent, but I
22 thought Mr. Wu said, in answer to some questions on
23 cross-examination, that if you looked at a website you
24 couldn't -- you couldn't reverse engineer it. You
25 couldn't tell exactly how it was implemented. Isn't

1 that what you recall?

2 A Well, actually that is true; but that's
3 because Mr. Wu was just looking.

4 If we look at the expert report from
5 Dr. Grimes, Dr. Grimes used a tool called Protocol
6 Analyzer, which captures all of the traffic that goes
7 across the wire from the server to the client. And if
8 you look at that traffic, you will find a wealth of
9 information about exactly what's going on.

10 Q So you think -- you think Mr. Wu doesn't know
11 about these code analyzers?

12 A He said that he was performing a use case.
13 It's not his purpose in performing a use case to
14 determine all the details of the underlying
15 architecture. That's not what a use case is for.

16 Q You think you know more about CompuServe than
17 Mr. Trevor?

18 A I beg your pardon?

19 Q Do you think you have know more about
20 how CompuServe is implemented than Mr. Trevor?

21 A Absolutely not, sir.

22 Q And he was unable to find these disclosures in
23 the pages that you're relying on; isn't that true?

24 A Can you be more specific about which
25 disclosures?

1 Q I gave you a list. I gave you the database.
2 I gave you the shopping cart, or the personal hold
3 folder. He was not able to find any description of them
4 in there. And you find it.

5 Do you think he knows more about CompuServe
6 than you do?

7 A No, but I think I can use logical reasoning to
8 explain how I arrived at that conclusion.

9 Q I think that was your direct examination. I'm
10 just asking you whether you think you can find things
11 that Mr. Trevor can't.

12 A Yes.

13 Q Now, let's get back to this programming issue,
14 if we will.

15 I think this is with respect to a number of
16 claims, but you gave it the most attention with respect
17 to Claim 17 of the '492 patent.

18 A Yes, sir.

19 Q Is that up there?

20 A That's it's 15, 41 --

21 Q I think it doesn't matter because I think it's
22 the same issue.

23 A Sure.

24 Q Server computers being programmed or wherever
25 that word programming appears.

1 I believe you took the position that sending
2 an html document is not programming; is that right?

3 A I don't take issue with the fact that the
4 server is programmed, sir. I only take issue with the
5 fact that the client is programmed.

6 Q Okay. And I think your basis is that you --
7 you call html -- you don't think html is programming
8 language?

9 A No, sir, I do not.

10 Q Okay. Have you ever written any books about
11 programming in html?

12 A I beg your pardon?

13 Q Have you written books about programming in
14 html?

15 A If you're asking me if any of my books have
16 titles that included the words programming in html in
17 the title, I can't remember.

18 Q Let's see if we can refresh your memory on
19 that.

20 MR. GIANNETTI: Put that up.

21 Q (By Mr. Giannetti) Is this one of your books?

22 A Yes. I think it was shown earlier.

23 Q Worldwide Web Programming with HTML.

24 You still say that html is not programming?

25 A Yes, I do. And the reason why I do is because

1 you have to combine CGI and html together before you
2 could do any kind of programmatic activity using html.

3 That's, in fact, the point of combining those
4 two terms on the title of that book.

5 Q So html itself is not programming language; is
6 that what you're saying?

7 A No, sir, it is not.

8 Q Even though it's referred to in your book as
9 programming with html and CGI?

10 A If you don't have the CGI, there is no
11 programming.

12 Q And you don't consider the http command
13 setting a cookie as programming?

14 A No, sir, I don't.

15 Q Even though it causes an action on the part of
16 the server?

17 A No, sir, I don't. I think -- my reasons for
18 believing that html is not a programming language have
19 to do with the fact that it's not computationally
20 complete. You can't do any math in it; you can't do
21 logic flow in it; you can't write general purpose
22 programs in it.

23 Html is a very special-purpose markup language
24 that's designed to move text, information, and objects
25 around and to show them on a page and to let users

1 interact with them. That doesn't mean that you can't do
2 things with it. That means that I don't see it as a
3 programming language.

4 Q You will admit it's a computer language,
5 though, right?

6 A It is a language that works within the context
7 of a web browser. A web browser runs on a computer. By
8 that, you know, logical extension, yes, it is a computer
9 language, but it's not a computer language in the sense
10 of something that you can run on a computer by itself to
11 get work done. You can't use html without a web
12 browser. In fact, the reason why CGI is so --

13 Q Sir, I think you answered my question.

14 A Okay. Sorry.

15 Q I think we agreed earlier that computers don't
16 have free will?

17 A Oh, yes.

18 Q And they only do what they're told?

19 A That's true.

20 Q And html -- html input tells them what to do?

21 A To some extent, yes.

22 Q And you say that's not programming?

23 A Yes, sir, I do.

24 Q One further question.

25 I notice that you have a book called HTML for

1 Dummies?

2 A Yes, I do.

3 Q And then a follow-on book, More HTML for
4 Dummies?

5 A That's right.

6 Q Would they still be dummies after they read
7 your first book?

8 (Laughter)

9 MR. ADAMO: Think carefully about this
10 one.

11 THE WITNESS: I think the publisher would
12 like to think so.

13 Q (By Mr. Giannetti) Let me just consult with my
14 colleagues. That may be my last question.

15 That's my last question, Mr. Tittel.

16 MR. GIANNETTI: Nothing further on the
17 direct. Pass the witness.

18 THE COURT: Thank you.

19 MR. GIANNETTI: Nothing further on cross.

20 THE COURT: Any redirect?

21 MR. BALDAUF: No redirect, Your Honor.

22 THE COURT: Thank you.

23 All right. You may step down,

24 Mr. Tittel.

25 THE WITNESS: Thank you.

1 THE COURT: Let me inquire of counsel as
2 to where we are.

3 I appreciate the Plaintiff gave back a
4 little time from what they had estimated yesterday.

5 MR. SAYLES: Well, I am about to do the
6 same, Your Honor.

7 THE COURT: Good. Well, I knew you
8 wouldn't want the Plaintiff to get ahead.

9 MR. SAYLES: That's right.

10 Consistent --

11 MR. ADAMO: Further ahead, Your Honor?

12 I'm sorry. It was --

13 THE COURT: All right.

14 MR. SAYLES: May it please the Court.

15 Consistent with the needs of the case and
16 the interest of justice, we have, however, in balancing
17 everyone's time, cut back on the depositions.

18 Shikhar Ghosh will be our next witness by
19 deposition. It is nine minutes. It's been cut to nine
20 minutes.

21 THE COURT: Okay.

22 MR. SAYLES: That's the only deposition
23 that we are going to offer.

24 THE COURT: Okay.

25 MR. SAYLES: And then after that we will

1 call Chris Bakewell.

2 THE COURT: Uh-huh.

3 MR. SAYLES: And as the Court may recall,
4 and the jury may recall, Mr. Ghosh has already been
5 identified as a founder and the chief executive officer
6 of Open Market.

7 THE COURT: Uh-huh. Okay. And let me
8 ask you about Mr. Bakewell. You are estimating an hour
9 and 20 minutes yesterday. What's your estimate today?

10 MR. SAYLES: I think that's about right.

11 THE COURT: And the nine minutes on
12 Mr. Ghosh includes both parties?

13 MR. SAYLES: It's all our time.

14 THE COURT: All right. And does
15 Plaintiff have any time that they want on Mr. Ghosh?

16 MR. ADAMO: No, Your Honor.

17 THE COURT: Okay. And then Mr. Bakewell,
18 how long is Plaintiff anticipating on cross of
19 Mr. Bakewell?

20 MR. SATINE: Your Honor, yesterday I was
21 anticipating an hour. I spoke to Mr. Sayles, I thought
22 he was cutting down, so I was cutting down. I guess I'm
23 back to my hour.

24 THE COURT: Okay. Well, all righty.
25 And then that will conclude Defendant's case, right?

1 MR. SAYLES: Yes, Your Honor, it would.

2 THE COURT: Then on rebuttal you have
3 who, Dr. Shamos?

4 MR. GIANNETTI: Yes, Your Honor,
5 Dr. Shamos.

6 THE COURT: Shamos. How long on direct
7 on Dr. Shamos?

8 MR. GIANNETTI: I would think about an
9 hour.

10 THE COURT: Good. That's 15 minutes less
11 than yesterday.

12 MR. GIANNETTI: Maybe an hour and a
13 quarter, but somewhere in that range.

14 THE COURT: We're back to the hour 15.

15 MR. GIANNETTI: I will shoot for an hour.

16 THE COURT: What about cross?

17 MR. SAYLES: My team tells me that it
18 will be 30 minutes or less.

19 THE COURT: Well, good. Let's see, that
20 puts us at about two and a half. All right. Very good.

21 We should be able to get through with the
22 evidence this -- is that your only witness on rebuttal?

23 MR. ADAMO: I was just about to rise to
24 say that, Your Honor. I know I had left some
25 uncertainty about that yesterday. But, yes, Dr. Shamos

1 will be our only rebuttal witness.

2 THE COURT: All right. Well, according
3 to my calculations then, Ladies and Gentlemen of the
4 Jury, it looks like we have about -- let's see, about
5 three, three hours of testimony left. So we should
6 finish ahead of schedule this afternoon. So we're not
7 going to be quite as rushed as I thought.

8 So I think what I'm going to do -- the
9 parties have been good enough to bring you in
10 sandwiches. They've been providing you with your snacks
11 all week. I know you appreciate that. Both parties
12 have split the cost on that. But just to try to make
13 this a little more bearable and comfortable for you, we
14 do have sandwiches brought in for you today, if you wish
15 to stay in and eat those sandwiches.

16 I was going to do a 30-minute lunch, but
17 I have another hearing to take up. And so that my staff
18 and I will have a chance to eat, I think we'll go ahead
19 and I will recess until 1 o'clock. And we should still
20 have plenty of time to finish the testimony this
21 afternoon.

22 So enjoy your lunch. Remember my
23 instructions. Don't discuss this case among yourselves
24 or with anyone else. And we'll see you back here at
25 1 o'clock. Be in recess.

1 COURT SECURITY OFFICER: All rise.

2 (Jury out.)

3 THE COURT: Please be seated.

4 MR. ADAMO: It's just housekeeping, Your
5 Honor.

6 THE COURT: Okay.

7 MR. ADAMO: What's the Court's -- what's
8 the Court's sense for where we start, stand, vis-a-vis
9 the jury charge and the verdict form?

10 THE COURT: We're working on it. I've
11 been trying to get some time to finish looking at it
12 here. Should have it for you sometime this afternoon,
13 certainly before afternoon break.

14 As soon as we get it, I will pass it out
15 to you, give you a chance to review it. I will hear
16 objections to the charge this afternoon after we've
17 concluded all of the evidence. That will be your only
18 chance to object.

19 When we come back in the morning at 9:00,
20 we will go straight into charging the jury and closing
21 argument.

22 MR. ADAMO: All right. Now, as --
23 obviously as we're approaching the close of their case,
24 it's our Rule 50 time. I have got one in writing, but
25 there are going to have to be some slight modifications.

1 THE COURT: We'll give you an opportunity
2 to do that when they rest.

3 MR. ADAMO: All right. I mean, the rule
4 is, as Ms. Frost of course reported to the Court, as
5 long as we get it to you before --

6 THE COURT: I don't know why they changed
7 that rule. That's troubling to me.

8 MR. ADAMO: It costs me a lot of
9 postcards and phone calls, et cetera, down to
10 administrative -- I don't know either, Your Honor. That
11 one seemed to just slip in and got changed.

12 But I'll have it in writing.

13 THE COURT: Okay. That's fine. Y'all
14 can file it whenever you want to under the rule anyway.

15 So, okay.

16 MR. GIANNETTI: Your Honor, also we
17 handed up a motion related to Mr. Trevor, and I would
18 like to know if we could file it electronically.

19 THE COURT: That's denied.

20 MR. GIANNETTI: Denied. I guess I don't
21 have to file it electronically.

22 THE COURT: No, you don't.

23 MR. GIANNETTI: Can I file it for the
24 record?

25 THE COURT: You should file

1 it electronically so we'll know -- the Court of Appeals
2 will know what motion I denied.

3 MR. ADAMO: As we did. I think you
4 probably saw where we came in this morning and filed
5 electronically the bench memos, the last motion that you
6 had also denied last evening, after having had your
7 permission.

8 THE COURT: Okay. That's fine. Just
9 don't put any new arguments in them after I've denied
10 them.

11 MR. ADAMO: Oh, no. Hard to believe as
12 it may seem, Your Honor, I like still being able to make
13 a living now that I'm about to turn 60. I'm a little
14 old to get this far and going back to being an engineer.

15 Of course, at the close of all the
16 evidence, I will reoffer, as I'm sure Mr. Sayles will
17 reopen Rule 50, but I don't intend on filing anything
18 further that the original paper.

19 THE COURT: All right. Very well.

20 MR. SAYLES: May it please the Court.

21 There's one other housekeeping item that
22 I'm going to mention because I don't want to forget it.
23 And that is, with regard to the stipulations. Rather
24 than take the time to read them into evidence, the Court
25 had suggested, and we have certainly accepted that

1 suggestion, we put them in in writing as an exhibit.

2 THE COURT: Uh-huh.

3 MR. SAYLES: And I believe that your
4 Clerk volunteered to pull those out of the Court's
5 charge for us to mark as an exhibit. I'm not trying to
6 give her work but --

7 THE COURT: I think we had had it as an
8 appendix, but I think it would be better just to have it
9 as an exhibit.

10 MR. ADAMO: Six of one, half a dozen of
11 the other.

12 THE COURT: Do you have that for him?

13 COURTROOM DEPUTY: Uh-huh.

14 THE COURT: She has it for you. Y'all
15 ought to offer that before you rest.

16 MR. SAYLES: We would like to do that.

17 Either way will work.

18 THE COURT: Anything further?

19 MR. ADAMO: No, sir.

20 THE COURT: We are going to take about a
21 five-minute recess, and then we will take up the
22 Sta-Rite versus ITT case.

23 (Lunch recess.)

24

25

1 C E R T I F I C A T I O N

2

3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled
5 matter.

6

7 /s/

8 SHEA SLOAN, CSR

9 OFFICIAL COURT REPORTER

10 STATE OF TEXAS NO. 3081

11

12

13 /s/

14 JUDITH WERLINGER, CSR

15 DEPUTY OFFICIAL COURT REPORTER

16 STATE OF TEXAS NO. 267

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